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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1113.

BRADLEY G. SCHLEY, PLAINTIFF IN ERROR,

vs.

PULLMAN'S PALACE CAR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 11, 1886.



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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 United States Circuit Court, Northern District of Illinois.

BRADLEY G. SCHLEY
vs.
PULLMAN'S PALACE CAR COMPANY. } Ejectment.

Messrs. Judd, Ritchie, Esher and Judd, attorneys for plaintiff in error; Alfred Ennis, Esq., attorney for defendant in error.

2 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, circuit judge of the United States for the seventh judicial circuit, on Friday, the ninth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

BRADLEY G. SCHLEY
vs.
PULLMAN'S PALACE CAR COMPANY. } Ejectment.

Be it remembered that on the twenty-ninth day of July, 1885, came the plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his bond for costs and declaration in said entitled cause, which said bond and declaration are respectively in the words and figures following, to wit:

3 *Bond for Costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court. October Term, A. D. 1885.

BRADLEY G. SCHLEY
vs.
PULLMANS' PALACE CAR COMPANY. } In Ejectment.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against plaintiff.

Dated this 27th day of July, A. D. 1885.

EDWARD B. ESHER.

Endorsed: Filed July 29, A. D. 1885. Wm. H. Bradley, clerk.

4 *Declaration.*

UNITED STATES OF AMERICA,
Northern District of Illinois:

In the Circuit Court of the United States for said District.

BRADLEY G. SCHLEY
vs.
PULLMAN'S PALACE CAR COMPANY. } Ejectment.

Bradley G. Schley, a citizen and resident of the State of Wisconsin, plaintiff, by Ritchie, Esher & Judd, his attorneys, complains of Pullman's Palace Car Company, a corporation organized and existing under the laws of the State of Illinois, and doing business and having its principal office in said northern district, defendant, of a plea of ejectment, for that the plaintiff, on April 1, A. D. 1885, was possessed of an undivided one-half part of a certain parcel of land, with the appurtenances, lying in the district aforesaid, to wit: That portion of the southeast quarter of section fifteen (15), township thirty-seven (37) north, range fourteen (14) east, of the third principal meridian (3 P. M.), in Cook county, Illinois, lying east of the Illinois Central railroad right of way, and bounded and described as follows: Commencing at the southeast corner of said section fifteen (15); running thence north nineteen hundred and eighty
5 (1,980) feet; thence west ten hundred and thirty-two (1,032) feet; thence south five hundred and eighty-one (581) feet; thence west four hundred and fifty-seven (457) feet to the east line of the right of way of the Illinois Central railroad; thence southwesterly along said right of way fourteen hundred and twenty (1,420) feet to the south line of said section fifteen (15); thence east eighteen hundred and fifty-five and four-tenths (1,855.4) feet to the place of beginning, containing sixty-five and eighty-six one-hundredths (65.86) acres, which said undivided one-half part of said tenements the plaintiff claims in fee. And the plaintiff being so thereof possessed, the defendant afterwards, to wit, on April 2, A. D. 1885, unlawfully entered into the said tenements, and now unlawfully withholds from the plaintiff the possession thereof, to the damage of the plaintiff of six thousand dollars ($6,000), and therefore he brings his suit, etc.

RITCHIE, ESHER & JUDD,
Plff's Attorneys.

Endorsed: Filed July 29, 1885. Wm. H. Bradley, clerk.

6 On the same day, to wit, on the twenty-ninth day of July, 1885, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

Writ.

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon Pullman's Palace Car Company, if it shall be found in your district, personally to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, and answer unto Bradley G. Schley in an action of ejectment, to the damage of said plaintiff, as he says, in the sum of six thousand dollars to recover the possession of the following-described premises, viz: An undivided one-half part of a certain parcel of land, with the appurtenances, situate in the county of Cook and northern district of Illinois, and known, designated, and described as follows: That portion of the southeast quarter of section fifteen (15), township thirty-seven (37) north, range fourteen (14) east, of the third principal meridian (3 P. M.), in Cook
7 county, Illinois, lying east of the Illinois Central railroad right of way, and bounded and described as follows: Commencing at the southeast corner of said section fifteen (15), running thence north nineteen hundred and eighty (1,980) feet; thence west ten hundred and thirty-two (1,032) feet; thence south five hundred and eighty-one (581) feet; thence west four hundred and fifty-seven (457) feet to the east line of the right of way of the Illinois Central railroad; thence southwesterly along said right of way fourteen hundred and twenty (1,420) feet to the south line of said section fifteen (15); thence east eighteen hundred and fifty-five and four-tenths (1,855.4) feet to the place of beginning, containing sixty-five and eighty-six one-hundredths (65.86) acres, in which premises said plaintiff claims an estate in fee; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 29th day of July, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the 110th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

8 Know all men by these presents that I have appointed, and by these presents do appoint, Geo. M. Jones my true and lawful deputy to execute the annexed writ, Bradley G. Schley *vs.* Pullman's Palace Car Company, and to make return of the execution thereof according to law.

F. H. MARSH, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and the hearing of and also by delivering a true copy thereof to George M. Pullman, president of Pullman's Palace Company, on the 3rd day of August, A. D. 1885.

F. H. MARSH,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

Geo. N. Jones, being duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 4th day of August, A. D. 1885.

[SEAL.] E. S. DAVIS,
Notary Public.

Endorsed: Filed Aug. 4, A. D. 1885. Wm. H. Bradley, clerk.

9 Afterwards, to wit, on the fifth day of October, 1885, came the defendant, by its attorney, and filed in said clerk's office its plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA, ss:

In the Circuit Court of the United States in and for the Northern District of Illinois.

BRADLEY G. SCHLEY, Plaintiff,
vs.
PULLMAN'S PALACE CAR COMPANY, Defendant. } Plea: Not guilty.

And now comes the defendant, by Alfred Ennis, its attorney, and defends the wrong and injury when, &c., and says that it is not guilty of unlawfully withholding the tenements in the said declaration mentioned, or any part thereof, in manner and form as the plaintiff has above thereof complained against him, and of this the defendant puts itself upon the country, etc.

ALFRED ENNIS,
Attorney and Counsel for Defendant.

Endorsed: Filed Oct. 5, 1885. Wm. H. Bradley, clerk.

10 Afterwards, to wit, on the fourteenth day of November, 1885, there was filed in said clerk's office a stipulation in

said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

United States Circuit Court, Northern District of Illinois.

BRADLEY G. SCHLEY
vs.
PULLMAN'S PALACE CAR COMPANY. } Ejectment.

It is hereby stipulated that a jury may be waived in the above-entitled cause and the same submitted to the court for trial.
Nov. 14, 1885.

RITCHIE, ESHER & JUDD,
Pl'ff's Att'ys.
ALFRED ENNIS, *Def't's Att'y.*

Endorsed: Filed Nov. 14, 1885. Wm. H. Bradley, clerk.

11 On the same day, to wit, on the fourteenth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

BRADLEY G. SCHLEY
vs.
THE PULLMAN'S PALACE CAR COMPANY. } Ejectment.

Now come the parties, by their attorneys, and upon issue joined upon the plea herein, by agreement of the parties, as per stipulation filed, they waive the intervention of a jury and for trial put themselves upon the court, and, after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of this cause be postponed until a future day.

Afterwards, to wit, on the twenty-third day of December, 1885, there was filed in said clerk's office the opinion of Judge Gresham in said above-entitled cause, which said opinion is in the words and figures following, to wit:

12 GRESHAM, *J.:*

These are actions in ejectment to recover lands upon which the city of Pullman in part stands. Juries were waived and the cases were submitted to the court upon a stipulation that, if the following instrument were held valid and binding as a deed of conveyance by husband and wife, judgments should be entered for the defendants:

"This indenture, made this 26th day of May, in the year of our Lord one thousand eight hundred and fifty-six, witnesseth: That I, Christina Lynn, sister and heir-at-law of Henry Millspaugh, deceased, who was a recruit of Lieutenant T. W. Denton, of 13th regiment, United States infantry, war of 1812, with Great Britain, of

the county of St. Clair and State of Michigan, party of the first part, in consideration of the sum of $43 in hand paid by Milton and Thomas C. McEwen, of the county of Orange and State of New York, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quit-clam unto the said party of the second part, their heirs and assigns forever, all her right, title, claim, and interest in that certain tract of land granted by the United States unto David Millspaugh and Christina Lynn, the brother and sister and only heirs-at-law of Henry Millspaugh, deceased, as follows, to wit: The southeast quarter of section numbered fifteen (15), in township numbered thirty-seven (37) north, of range numbered fourteen (14) east, in the district of land subject to sale at Chicago, State of Illinois, containing one hundred and sixty (160) acres, by letters patent bearing date of November 23d, in the year of our Lord one thousand eight hundred and forty-nine, and founded upon warrant No. 27495, as, reference being made to said patent, will more fully appear; to have and to hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining, to their only proper use, benefit, and behoof of said parties of the second part, their heirs and assigns forever.

"In witness whereof the said grantor- have hereunto set our hands and seals the day and year first above written.

"CHRISTINA LYNN. [SEAL.]
"WILLIAM LYNN." [SEAL.]

Following is the certificate of Obed Smith, a justice of the peace of St. Clair county, Michigan, dated May 27, 1856. The officer certified that on that day Christina Lynn and William Lynn, her husband, personally appeared before him; that he knew them to be the persons who executed the foregoing instrument; that they acknowledged it to be their free act and deed; and that after he had personally examined the wife, separate and apart from her husband, and had fully informed her of the contents, she acknowledged that she executed the same freely and without compulsion from her husband.

Section 2 of the act of February 22, 1847 (2 Scates, Treat & Blackwell's Ill. Stat., 965), declares that when any married woman above the age of eighteen years and not residing in this State joins with her husband in the execution of any deed, mortgage, or conveyance of any real estate situated within Illinois she shall be barred thereby of all the estate, right, title, interest, and claim of dower therein the same as if she were unmarried and of full age; and it is further declared that such a married woman may acknowledge such deed, etc., as if she were unmarried. This statute was in force when Mrs. Lynn and her husband executed the deed in Michigan, where they then resided, and she was at that time above the age of eighteen. It is insisted by counsel for the plaintiff that the statute required the husband to be a joint grantor with his wife; that his mere signing, sealing, and acknowledging the deed was not sufficient when his name did not appear in the granting clause or body of the instrument, and that it was, therefore, inoperative and void. It was only in sub-

stantial compliance with this statute that the wife could convey title to her lands. The husband was required to join her in the execution of a deed. Did the husband join in the execution of this deed? That he intended to do so and thought he had admits of no doubt, and it is equally clear that both the wife and husband undertook in good faith to convey their entire interest and estate in the premises to the grantees. The husband signed, sealed, and acknowledged the deed to enable his wife to convey her title and to convey any claim or right, present or contingent, that he had in the land. The wife and her husband rested, and no doubt died, in the belief that they had joined in the execution of a deed in compliance with the statute, and it remained for some one, after the lapse of twenty-nine years, to discover, as he supposed, that they had utterly failed to accomplish what they undertook to do and what they supposed they had done. Courts should uphold deeds and other contracts when the intention of the parties is clear. Although the husband's name does not appear in the body of the deed, he signed, sealed, and delivered it, and thus joined his wife in its execution.

Johnson *v.* Montgomery, 51 Ill., 185, was a suit for assignment of dower. On January 26, 1853, Johnson, a resident of Ohio, executed in that State a deed conveying his lands in Illinois to Montgomery. Johnson's wife signed the deed with her husband and acknowledged it before a proper officer. The certificate of acknowledgement was in conformity with the statute, but the body of the deed did not describe Johnson's wife as a grantor, or name her in connection with dower, or in any other way. In holding that this was a valid deed and sufficient to relinquish the wife's right of dower under section 21 of the act of 1845 regulating conveyances, the court said that apt words of grant in the body of the deed were unnecessary, as the wife was required to join her husband in the deed—not to transfer title from her, but merely to extinguish her contingent right of dower.

When Mrs. Lynn and her husband executed their deed in 1856 the latter had the rights which the common law gave him in his wife's real estate in Illinois. He was entitled to the rents and profits during their joint lives, and a life estate thereafter if he survived his wife. While his rights differed in some material respects from the inchoate right of dower, still the reasoning in this case tends to support the deed under consideration.

In Miller *v.* Shaw, 103 Ill., 277, the court was required to pass upon the validity of a married woman's deed for her separate property in Illinois, the husband having signed and acknowledged the deed, his name not appearing, however, in the granting clause. The statute in force at the time (sec. 21 of the act of 1845) provided that when any husband and wife residing in this State wished to convey the real estate of the wife it should be lawful for the husband and wife, she being above the age of eighteen years, to do so by the execution of their joint deed, the wife being required to appear before some judge or other officer authorized to take acknowledgments of such instruments and acknowledge the same, being previously made acquainted with the contents. A deed thus executed and acknowledged the statute declared to be as effective as if executed by the

wife before marriage. The court held that this was a valid deed under the statute, and bound both the wife and husband.

In Yocum *v.* Lovell, recently decided by the supreme court of Illinois, but not yet reported, it was held that a deed signed and acknowledged by husband and wife was sufficient to extinguish the homestead right of both though the wife's name did not appear in the granting clause or elsewhere in the body of the deed. The court say that section 4, chap. 52, Rev. Stat. of 1874, declared that no release, waiver, or conveyaace of the homestead should be valid unless the same was in writing, subscribed by the householder and his wife, and acknowledged as required in the execution of deeds conveying real estate, and that the statute was substantially complied with.

Judgments will be entered for the defendants in the three cases.

Endorsed: Filed Dec. 23, 1885. Wm. H. Bradley, clerk.

13 On the same day, to wit, on the twenty-third day of December, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

BRADLEY G. SCHLEY
vs.
PULLMAN'S PALACE CAR COMPANY. } Ejectment.

14 Now come the parties, by their attorneys, and the court having considered and being now fully advised upon the matters heretofore submitted, herein finds the defendant not guilty. It is thereupon considered and adjudged by the court that the said defendant be discharged and that it go hence without day, and that it have and recover of said plaintiff its costs in this behalf expended, amounting to — dollars and — cents, and that it have execution therefor.

Afterwards, to wit, on the ninth day of July, in the July term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

BRADLEY G. SCHLEY
vs.
THE PULLMAN'S PALACE CAR COMPANY. } Ejectment.

By agreement of the parties, as per stipulation filed, it is ordered that the judgment, finding, and order waiving jury and submitting this cause to the court be set aside and vacated and this cause be reinstated upon the docket.

15 On the same day, to wit, on the ninth day of July, in the July term of said court, 1886, in the record of the proceed-

ings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following ent y, to wit:

Judgment.

BRADLEY G. SCHLEY
vs.
PULLMAN'S PALACE CAR COMPANY. } Ejectment.

Come now the parties to the above and foregoing entitled suit, the plaintiff and the defendant therein, by their respective counsel therein, and by mutual agreement in open court a first trial of such suit is waived by each party, a jury in such suit is also waived by each party, and a second trial of such suit, to which, upon the payment of costs, either party would be entitled as of right under the laws of the State of Illinois, is now entered upon by the court upon a stipulation between the parties, as follows—that is to say, that if the court shall find to have been valid and binding a certain deed of conveyance, dated May 26th, 1856, executed by Christina Lynn and William Lynn, her husband, to Milton McEwen and Thomas C. McEwen, which was in words and figures following:

"This indenture, made this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six,
16 witnesseth: That I, Christina Lynn, sister and heir-at-law of Henry Millspaugh, deceased, who was a recruit of Lieutenant T. W. Denton, of Thirteenth regiment United States infantry, war of 1812 with Great Britain, of the county of St. Clair and State of Michigan, party of the first part, in consideration of the sum of forty-three dollars in hand paid by Milton & Thomas C. McEwen, of the county of Orange and State of New York, party of the second part, the receipt of which is hereby acknowledged, do hereby release, grant, bargain, and quit-claim unto the said party of the second part, their heirs and assigns, forever, all her right, title, claim, and interest in that certain tract of land granted by the United States unto David Millspaugh and Christina Lynn, the brother and sister and only heirs-at-law of Henry Millspaugh, deceased, as follows, to wit: The southeast quarter of section numbered fifteen (15), in township numbered thirty-seven (37) north, of range numbered fourteen (14) east, in the district of lands subject to sale at Chicago, State of Illinois, containing one hundred and sixty acres, [as] by letters patent bearing date of November twenty-third, in the year of our Lord one thousand eight hundred and forty-nine, and founded upon warrant number 27495, reference being made to said patent, will more fully appear; to have and to hold the said premises, with all the appurtenances thereunto belonging or in anywise appertaining, to their only proper use, benefit, and behoof of said
17 parties of the second part, their heirs and assigns, forever.

"In witness whereof the said grantor- have hereunto set our hands and seals the day and year first above written.

her
"CHRISTINA x LYNN. [SEAL.]
mark.
"WILLIAM LYNN. [SEAL.]

"Signed, sealed, and acknowledged in presence of—
"MARY A. LYNN.
"OBED SMITH."

"STATE OF MICHIGAN, *County of St Clair:*

"On this twenty-seventh day of May, A. D. 1856, before me, [a] justice of the peace in and for said county of St. Clair, personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed; and the said Christina Lynn, having been by me privately examined separate and apart from the said husband and fully understanding the contents of the foregoing instrument, acknowledged that she executed said deed freely and without any force or compulsion from her said husband or from any one.

"OBED SMITH,
"*Justice of the Peace.*"

Then and in that event the finding and judgment of the court is to be for the defendant—that is, the defendant is not guilty.

18 That the said deed of conveyance being submitted to the court, and argument of counsel for the respective parties being heard, and the court, being duly advised in the premises, doth find for the defendant; that the said deed of conveyance was valid and binding from the said Christina Lynn and William Lynn, her husband, to the said Milton McEwen and Thomas C. McEwen, to all their, the said Christina Lynn's and William Lynn's, her husband's, right, title, and interest in and to the real estate therein described.

That the plaintiff, by his counsel, thereupon moves the court for a new trial of such suit, and the argument of counsel for the respective parties being heard, and the court, being duly advised in the premises, overrules such motion, to which ruling and opinion of the court the plaintiff at the time excepts; that in pursuance of such finding and ruling of the court judgment is accordingly entered in favor of the defendant and against the plaintiff.

It is thereupon considered and adjudged by the court that said defendant be discharged, and that it go hence without day, and that it have and recover of said plaintiff its costs in this behalf expended, amounting to — dollars and — cents, and that it have execution therefor.

19 And on motion of the plaintiff's attorney, the time to file a bond for writ of error, which is fixed at one thousand dollars, and bill of exceptions, is extended sixty days.

20 Afterwards, to wit, on the seventh day of September, 1886, there was filed in said clerk's office a bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

U. S. Circuit Court, Northern District of Illinois.

BRADLEY G. SCHLEY
vs.
THE PULLMAN'S PALACE CAR COMPANY. } Ejectment.

Know all men by these presents that we, Bradley G. Schley, of Milwaukee, Wisconsin, as principal, and S. Corning Judd, of Chicago, Illinois, as surety, are held and firmly bound unto the Pullman's Palace Car Company in the penal sum of one thousand dollars ($1,000), to be paid to the said Pullman's Palace Car Company, its successors or assigns; to which payment, well and truly to be made, we hereby bind ourselves, jointly and severally, firmly by these presents.

Whereas the above-named Bradley G. Schley has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

21 Now, therefore, the condition of this obligation is such that if the said Bradley G. Schley shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 6th day of September, A. D. 1886.

BRADLEY G. SCHLEY. [SEAL.]
S. CORNING JUDD. [SEAL.]

Approved:
W. Q. GRESHAM,
Circuit Judge.

Endorsed: Filed Sept. 7, 1886. Wm. H. Bradley, clerk.

22 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Bradley G. Schley is the plaintiff and Pullman's Palace Car Company is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this twentieth day of September, 1886.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

23 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court, between Bradley G. Schley, plaintiff, and Pullman's Palace Car Company, defendant, in an action of ejectment, a manifest error hath happened, to the great damage of the said Bradley G. Schley, plaintiff, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1886, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States,
Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Bradley G. Schley, plaintiff in error, *vs.* Pullman's Palace Car Company, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S, northern district of Illinois.

24 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To The Pullman's Palace Car Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1886, pursuant to a writ of error in a certain action at law wherein Bradley G. Schley was plaintiff and said Pullman's Palace Car Company was defendant, which writ was filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein judgment was rendered for the defendant, to show cause, if any there be, why the judgment mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Walter Q. Gresham, circuit judge, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-six.

W. Q. GRESHAM.

Service acknowledged this September 17th, 1886.

PULLMAN'S PALACE CAR COMPANY,
By ALFRED ENNIS, *Att'y & Counsel.*

[Endorsed:] Supreme Court of the United States. Bradley G. Schley *vs.* Pullman's Palace Car Co. Citation to October term, A. D. 1886.

25 *Assignment of Errors.*

In the Supreme Court of the United States. October Term, 1886.

BRADLEY G. SCHLEY, Plaintiff in Error,
vs.
THE PULLMAN'S PALACE CAR COMPANY, Defendant in Error.

Error to the circuit court of the United States *for the United States* for the northern district of Illinois.

And now comes the plaintiff in error, by Judd, Ritchie, Esher & Judd, his counsel, and shows unto this court that in the aforegoing judgment, record, & proceedings there is manifest error:

First. In that the court below held binding and valid the deed from Christina Lynn and William Lynn to Milton McEwen and Thomas C. McEwen as a conveyance of the fee-simple title of said Christina in and to the land therein described.

Second. In that the court below rendered judgment for the defendant.

Third. Other errors, irregularities, and insufficiencies in the said record, judgment, and proceedings.

And therefore he prays that said judgment may be reversed and held for naught.

JUDD, RITCHIE, ESHER & JUDD,
Counsel for Plaintiff in Error.

26 *Affidavit.*

In the Supreme Court of the United States.

BRADLEY G. SCHLEY, Plaintiff in Error,
vs.
THE PULLMAN'S PALACE CAR CO., Defendant in Error.

In error to the circuit court of the United States for the northern district of Illinois.

STATE OF ILLINOIS, *Cook County:*

William Ritchie, being first duly sworn, on oath says that he is familiar with the land in controversy in this cause, to wit, a tract situate in Cook county, Illinois, in the southeast quarter of section

fifteen (15), township thirty-seven (37) north, range fourteen (14) east, of the third principal meridian, commencing at the southeast corner of said section fifteen (15), running thence north nineteen hundred and eighty (1,980) feet; thence west ten hundred and thirty-two (1,032) feet; thence south five hundred and eighty-one (581) feet; thence west four hundred and fifty-seven (457) feet to the east line of the right of way of the Illinois Central railroad; thence southwesterly along said right of way fourteen hundred and twenty (1,420) feet to the south line of said section fifteen (15); thence east
27 eighteen hundred and fifty-five (1,855.4) and four-tenths feet to the place of beginning, containing sixty-five and eighty-six one-hundredths (65.86) acres, and with the value thereof; and affiant says that an undivided one-half interest in fee-simple in and to the said land exceeds in value the sum of six thousand dollars ($6,000.00).

WM. RITCHIE.

Subscribed and sworn to before me this 8th day of October, A. D. 1886.

[Seal Edward S. Judd, Notary Public, Cook County, Ill.]

EDWARD S. JUDD,
Notary Public, Cook County, Illinois.

[Endorsed:] U. S. Supreme Court. Oct. T., 1886. Bradley G. Schley *vs.* Pullman's Palace Car Co. Affidavit of value.

Endorsed on cover: N. Illinois C. C. U. S. No. 1113. Bradley G. Schley, plaintiff in error, *vs.* Pullman's Palace Car Company. Filed October 11, 1886.

120-575

SUPREME COURT, U.S.
FILED
OCT 11 1886
JAMES H. MCKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

BRADLEY G. SCHLEY,
Plaintiff in Error,
vs.
THE PULLMAN'S PALACE CAR COMPANY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument for the Plaintiff in Error.

ALBERT RITCHIE, EDWARD B. ESHER,
WILLIAM RITCHIE, EDWARD S. JUDD,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO



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vs.
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Error to the Circuit Court of the United States for the Northern District of Illinois.

Brief and Argument for the Plaintiff in Error.

I.

This was an action of ejectment. The plaintiff in error was the plaintiff below. The question of title between the parties depending upon the validity of a certain deed, a jury was waived, and the question of the validity of said deed was, on stipulation, submitted to the court, it being agreed that, in case the same should be held valid, judgment should be entered for the defendant.

There was a special finding by the court to the effect that the deed was valid, and thereupon, after the overruling of plaintiff's motion for a new trial, judgment was entered for defendant on July 9, 1886, to which judgment this writ is prosecuted.

It should be observed that what appears from the record to have been an entry of judgment on December 23, 1885, was the result of a mistake on the part of the minute clerk and was made without the court's order.

II.

The plaintiff in error assigns the following as error.

1st. The court below erred in holding the deed from Christina and William Lynn to Milton and Thos. C. McEwen to be valid.

2d. The court below erred in rendering judgment for defendant.

3d. The record and proceedings were otherwise irregular, erroneous and insufficient.

III.

The only question involved is as to the validity of the following deed, viz:

"This indenture made this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six witnesseth that I Christina Lynn sister and heir at law of Henry Millspaugh deceased who was a recruit of Lieutenant T. W. Denton of Thirteenth Regiment United States infantry war of 1812 with Great Britain of the County of St. Clair and State of Michigan party of the first part in consideration of the sum of forty-three dollars in hand paid by Milton & Thomas C. McEwen of the County of Orange and State of New York party of the second part the receipt of which is hereby acknowledged do hereby release grant bargain and quit-claim unto the said party of the second part their heirs and assigns forever all her right title claim and interest in that certain tract of land granted by the United States unto David Millspaugh and Christina Lynn the brother and sister and only heirs at law of Henry Millspaugh deceased as follows to wit: The south-east quarter of section num-

bered fifteen (15) in township numbered thirty-seven (37) north of range numbered fourteen (14) east in the district of lands subject to sale at Chicago State of Illinois containing one hundred and sixty acres by letters patent bearing date of November twenty-third in the year of our Lord one thousand eight hundred and forty-nine and founded upon warrant number 27,495 reference being made to said patent will more fully appear. To have and to hold the said premises with all the appurtenances thereunto belonging or in anywise appertaining to their only proper use benefit and behoof of said parties of the second part their heirs and assigns forever.

In witness whereof the said grantor have hereunto set our hands and seals the day and year first above written.

her
CHRISTINA × LYNN. [SEAL.]
mark.
WILLIAM LYNN. [SEAL.]

Signed, sealed and acknowledged, in presence of
MARY A. LYNN.
OBED SMITH.

"STATE OF MICHIGAN, }
COUNTY OF ST. CLAIR. }

"On this twenty-seventh day of May A. D. 1856 before me a justice of the peace in and for said county of St. Clair personally came Christina Lynn and William Lynn her husband known to me to be the persons who executed the foregoing instrument and acknowledged the same to be their free act and deed. And the said Christina Lynn, having been by me privately examined separate and apart from the said husband, and fully understanding the contents of the foregoing instrument, acknowledged that she executed said deed freely and without any force or compulsion from the said husband, or from any one.

OBED SMITH,
Justice of the Peace."

Did this deed suffice to convey Christina Lynn's fee simple title to the land described, she being then a married woman and residing with her husband in Michigan?

We submit that it did not, but that the deed is void under the laws of Illinois, where the land lies.

Our objections are: First, that the husband is not a party to the deed. Second, that the acknowledgment is defective.

The statutes of Illinois relating to the subject, which were in force at the date of this deed (May 26, 1856), are as follows:

"When any *feme covert*, not residing in this state, being above the age of eighteen years, shall *join with her husband in the execution* of any deed, mortgage, conveyance, or other writing of, or relating to, any lands or real estate, situate within this state, she should thereby be barred of and from all estate, right, title, interest and claims of dower therein, in like manner as if she was sole, and of full age. And any such *feme covert* joining with her husband in the execution of a power of attorney or other writing, authorizing the sale, conveyance, or other disposition of lands or real estate, as aforesaid, shall be bound and concluded by the same, in respect to the right, title, claim or interest in such estate, as if she were sole and of full age, as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing, may be the same as if she were sole, and shall entitle such deed, mortgage, conveyance, power of attorney, or other writing, to be recorded as is authorized by this act; and the provisions of this section shall apply to deeds, mortgages, conveyances, powers of attorney, and other writings heretofore, as well as those which may hereafter be executed."

1 Gross's Stat. Ills., Tit. "Conveyances," Ch. 24, Sec. 24. (Act of Feby. 22, 1847.)

"No act, deed or conveyance, performed or executed by the husband, without the assent of his wife, evinced by the acknowledgment thereof, in the manner required by law, shall pass the estate of a married woman; and no judgment or decree confessed or recovered against him, and no laches, default, covin, forfeiture or crime of the

husband, shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

Rev. Stat. Ill., 1845, Ch. 34, Sec. 14.

"No judge or other officer shall take the acknowledgment of any person to any deed or instrument of writing as aforesaid, unless the person offering to make such acknowledgment shall be personally known to him to be the real person who, and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness, and *the judge or officer taking such acknowledgment shall, in his certificate thereof, state that such person was personally known to him to be the person whose name is subscribed to such deed or writing, or having executed the same, or that he was proved to be such by a credible witness* (*naming him,*) and on taking proof of any deed or instrument of writing by the testimony of any subscribing witness, the judge or officer shall ascertain that the person who offered to prove the same, is a subscribing witness, either from his own knowledge, or from the testimony of a credible witness; and if it shall appear from the testimony of such subscribing witness that the person whose name appears subscribed to such deed or writing is the real person who executed the same, and that the witness subscribed his name as such, in his presence and at his request, the judge or officer shall grant a *certificate, stating that the person testifying as subscribing witness was personally known to him to be the person whose name appears subscribed to such deed, or a witness of the execution thereof, or that he was proved to be such by a credible witness,* (*naming him,*) *and stating the proof made by him;* and where any grantor or person executing such deed or writing, and the subscribing witnesses are deceased, or can not be had, the judge or officer, as aforesaid, may take proof of the handwriting of such deceased party and subscribing witness or witnesses (if any), and the examination of a competent and credible witness, who shall state on oath or affirmation that he personally knew the person whose handwriting he is called [to] prove, and well knew his signature (stating his means of knowledge), and that he believes the name

of such person subscribed to such deed or writing, or party or witness (as the case may be), was thereto subscribed by such person; and when the handwriting of the grantor or person executing such deed or writing, and of one subscribing witness, (if any there be,) shall have been proved as aforesaid, the judge or officer shall grant a *certificate* thereof, *stating the proof aforesaid*."

1 Gross' Stat. Ill., Tit., "Conveyances," Ch. 24, sec. 31.
(Rev. Stat. Ill., 1845.)

The portions of the deed to which we deem it material to invite especial attention are as follows:

"This indenture....witnesseth that I, *Christina Lynn*, *sister* and heir at law of Henry Millspauph, deceased.... PARTY *of the first part* ...*do* hereby release, grant, etc., ...all HER right, title, etc.

"In witness whereof the SAID *grantor* have hereunto set our hands and seals."

In the acknowledgement it is recited that

"....before me, a justice of the peace....personally came Christina Lynn and William Lynn, her husband, *known to me* to be the persons who executed the foreforegoing instrument, etc. And the said Christina Lynn acknowledged that she executed said deed freely and without any *force* or compulsion from her said husband, or any one."

William Lynn did not "join" in this deed.

He is nowhere mentioned in the deed itself. The deed does not even disclose the fact that Christina was a married woman, or that she acts therein as a married woman, or intends to affect her rights as such. The subject matter of conveyance is (not the interest or title of both husband and wife, but) only "*her* right, title," etc. There is but *one* "*party* of the first part," and that party is "I, Christina Lynn, sister, etc., of Henry Millspaugh." There is but one "*grantor*" mentioned, and that is "the SAID

grantor," that is, the one herein*before* mentioned, the same being "I, Christina Lynn, party of the first part."

The fact "in witness whereof" William Lynn signed his name was the fact that Christina Lynn had transferred, or attempted to transfer, "*her* title," nothing more. Any mere subscribing witness might, with just as much propriety, have signed this instrument precisely as he did.

The attestation clause was doubtless meant to read: "In witness whereof [I] the said grantor, [and William Lynn] have hereunto set our hands and seals," etc.

This clause cannot be construed as including William Lynn as a "grantor." First, because the word "grantor" is in the singular number, and second, because it is qualified by the word "said," which can only refer to some person *already* mentioned in the deed, that is, to Christina *alone*.

The certificate of acknowledgement cannot be referred to to supply any omissions in the deed itself. The deed is the act of the parties, but the certificate is but the act of the certifying officer, and cannot operate to effectuate an intent not carried out by the act of the parties themselves.

Davis v. *Bartholomew*, 3 Ind., 491.

"To suppose so would be to assume that the legislature meant to expressly authorize an act which they considered as a part of the contract of conveyance, and which could proceed only from the will of the grantor to be performed by an independent agency, and against the wish of the grantor."

Brown v. *McCormick*, 28 Mich., 219.

Livingston v. *Jones*, Harr. Ch. (Mich.), 105.

A deed may be effectual between the parties without any certificate of acknowledgment at all.

See the form of certificate in *Agricultural Bank* v. *Rice*,

4 How., 230, which, though equally as full and explicit as in the case at bar, was held inadequate to supply defects in the body of the deed.

To rightly interpret this deed, it is necessary to note the condition of the law of Illinois at the time of its execution.

In *Lane* v. *Soulard*, 15 Ill., 123, the court says:

"The revised statutes (of 1845) repealed all former laws on the subject of conveyances of real estate, and authorized married women within this state to convey their land by joining with their husbands and acknowledging the deeds in a specified way; but no authority was given for married women residing out of this state to convey their lands lying within it. The law thus continued till the act of the 22d of February, 1847, which authorizes married women without the state to convey their lands lying within this state. In April, 1846, Mrs. Lane, with her husband, executed this deed of trust in the city of St. Louis, where she then resided. The question is whether this was a valid conveyance. We shall not stop to adduce authorities to show that a *feme covert* cannot, except she be authorized by an express statute, convey her fee simple title to real estate by deed. She is incapable of doing so at the common law, and hence there can be no law for it, unless it be by statute. Without a statute she is as incapable of conveying by deed as she is by word of mouth. From 1845 to 1847 there was no statute enabling married women without the state to convey their lands lying within it. This deed, having been made without the authority of law and against law, was simply void, as void as if it had been expressly prohibited by a positive statute. * * * Notwithstanding this deed of trust, Mrs. Lane was, on the 21st of February, 1847, as much the absolute owner of this land as if she had never made such a deed. This deed affected her right to it in no way whatever any more than if it had continued a blank piece of paper, or her name had been forged to it by another, instead of being written by herself."

In *Higgins* v. *Crosby*, 40 Ill., 261, Mr. and Mrs.

Wright, owning land in her right, in Illinois, joined in a deed thereof to Rogers. The deed was executed at New York, on February 10, 1847. Rogers, soon after purchasing, went into actual possession, and on December 6, 1855, conveyed to Crosby, who took immediate possession and held until this suit was brought, he and his grantor also paying all taxes. On December 22, 1863, Mr. Wright having died, his wife executed a second deed for the same lot to the plaintiff, Higgins, who thereafter, about three years after Wright's death, brings ejectment against Crosby, at which time the latter was able to set up in defense an actual possession and payment of taxes under the first deed for nearly eighteen years. But the court held that the first deed was inoperative to convey Mrs. Wright's fee, but could only carry her husband's life estate; that the statute of limitations did not run against her until her husband's death, because

" . . during the life of her husband she could not have maintained any action for the recovery of the premises, and she would have been a trespasser had she made an entry. The deed from Wright and wife to Mrs. Rogers having been executed out of this state after the 10th of September, 1845, and before the 22d of February, 1847, it was without legal authority. During that period we had no statute which authorized a *feme covert* residing beyond the limits of the state to convey her property, and this deed consequently did not pass the fee."

The plaintiff was therefore held entitled to recover.

In *Rogers* v. *Higgins*, 48. Ill, 211, the same case came again before the Supreme court upon a bill in equity by the heir of Mrs. Rogers to restrain the prosecution of the ejectment suit by Higgins. It was shown that Mrs. Wright received from complainant's ancestor the (then) full value of the fee to the lot in suit; that the second deed from Mrs. Wright to Higgins (in 1863) was but a

quit claim, and that Higgins took with full notice of the sale to Mrs. Rogers and that the latter had paid full value for the land But even upon such a showing and in a court of equity the complainant as held entitled to no relief.

The court says:

"It is not disputed, nor can it be, that at the time this deed was executed and delivered (Feb. 10, 1847,) there was no statute in the state which authorized a [non-resident] married woman holding real estate in Illinois to execute a deed for its conveyance. There is no principle of the common law more firmly established or uniformly recognized, than that a married woman is incapable of conveying her property by any of the usual deeds executed for the assurance of title to land. Nor can she make any binding contract unless authorized by legislative enactment. Without such authority a deed executed by her for the conveyance of her land, or any other contract, is void and not merely voidable. But appellant insists that there are equities in the case that entitle him to relief. That there is hardship, no one will deny. He and his mother, for many years after having paid for it, have occupied the lot and supposed it to be theirs, never suspecting their title to be defective."

But relief was denied because,

"Equity follows, but never violates, the law, common or statutory, nor does it ever decree against its provisions or policy. . . . We do not propose to consider whether the changes in society require a change of the law placing married women under disability. We find that the common law, as it has descended to us, has from the remotest period of its history to the present recognized such disabilities, and our legislature has declared it to be the rule of decision until altered or repealed."

A married woman could not in 1848 be bound by any contract (short of a deed) relating to her realty, whether joined by her husband or not.

Spurck v. *Crook*, 19 Ill., 427-8.
Moulton v. *Hurd*, 20 Ill., 142.

The provisions enabling married women to convey by deed is in derogation of the common law, enlarging the *feme covert's* power, and authorizing a less formal mode of conveyance than the ancient and solemn proceeding of levying fine in open court. The statutory provisions should therefore be strictly complied with.

Brown v. *Fifield*, 4 Mich., 326.
Moulton v. *Hurd*, *supra*.
Russell v. *Rumsey*, 35 Ill., 370, 371.

Equity will not reform a married woman's deed.

Ibid.
Lindley v. *Smith*, 48 Ill., 250.

In *Russell* v. *Rumsey*, it was stated in the certificate of acknowledgment that the wife, upon privy examination, had "acknowledged that she had executed the same (*i. e.* "the deed of her husband's realty), freely and volun- "tarily, and without compulsion of her husband," but it was not stated whether or not she relinquished her dower. *Held*, that dower was not barred.

Of course, her signature could have been for no other possible purpose, and, therefore, counsel "urged that she "knew when she executed the deed that the purchaser "expected to obtain a release of her dower, and that "she must have designed to bar it by her act." But to this the court replied: "The same might be said "with equal truth, if she had only signed the deed and "acknowledged it in the presence of a subscribing wit- "ness."

A married woman is not estopped by the fact that she has received full value for the land, in the absence of actual fraud.

Rogers v. *Higgins*, 48 Ill., 220.
Oglesby Coal Co. v. *Pasco*, 79 Ill., 169.
Agricultural Bank v. *Rice*, 4 How., 225.

According to the common law:

"If the wife be seized of an estate of inheritance in land, the husband becomes seized of the freehold *jure uxoris*, and he takes the rents and profits. It is a freehold estate in the husband, since it must continue during their joint lives, and it may last during his life. During the continuance of the life estate of the husband, he sues in his own name for an injury to the profits. . . . The husband has an interest . . . that may be seized and sold on execution."

2 Kent, Com. *130.

So, the husband might lease his wife's lands, and, even though she may have joined in the lease, such lease, in pleading, might properly be described simply as the lease of the husband, "such being its legal effect."

1 Chitty Pl., *308.

Arnold v. *Revoult*, 4 Moore, 71.

Such life estate of the husband is

"As completely his as if his wife, before the marriage, had owned and conveyed it to him for a valuable consideration. The marriage was such a consideration, and the moment it occurred, the husband stood seized of an estate during coverture in the realty hitherto belonging to his wife by as complete a title as that by which he had held his own lands in fee. From that time his life estate could with no more propriety be described as belonging to his wife, as her sole and separate property, than could lands owned by him before the marriage, or the lands of any third person."

Rose v. *Sanderson*, 38 Ill., 249.

Haralson v. *Bridges*, 14 Ill., 37.

"The effect of marriage, at least in courts of law, is to deprive the wife of all separate legal existence, her husband and herself being in law but one person."

1 Chitty Pl., *28.

"For rent or other cause of action accruing during marriage, on a lease or demise, or other contract relating to

the land or other real property of the wife, whether such contract was made before or during coverture, the husband and wife may join, or *he may sue alone*." *Id.*, *31.

The old form of pleading title where the fee was in the wife used to run:

"For that, whereas, A B, and C, his wife, before and at the time, &c., *were* seized in *their* demesne, as of fee, in right of said C," &c.

2 Chitty Pl., *561.

So, the old form of conveyance of the wife's realty ran:

"Know all men, &c., that *we*, A B, and C, his wife, in right of said C, *do* give, grant, &c. And the said A B, for himself, his heirs, &c., *doth* covenant that *he*, the said A B, and C, his wife, *are* lawfully seized in fee," etc., etc.

Oliver's Conveyancing, 4th ed., 178.

Such was the condition of the law in 1856, when the Lynn deed was made.

Subsequently the following statutes have been enacted in Illinois:

The act of February 21, 1861, providing:

"That all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her, the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

Pub. Sess. Laws Ill., 1861, p. 143.

Since this act, a deed to husband and wife no longer makes them tenants by entirety, but tenants in common.

Cooper v. *Cooper*, 76 Ill., 57.

"Our statutes have so far changed the common law, that they are not one person, so far as the acquisition and enjoyment of property is concerned. To the extent of acquiring property, and so far as its enjoyment is concerned, and the enjoyment of her earnings; the statute (act of 1861), has declared, in effect, that they are two independent persons; and in so doing, great modifications have been wrought as to their rights of property. . . . *The husband, under the statute, has no more immediate interest in or control over her property than has any other person.*"

Ibid.

"*Such a change in the relative rights and powers of husband and wife must, of necessity, give a different operation to the rules of law, by which they are to be governed.*" . . .

"By this statute a married woman must be considered as a *femme sole* in regard to her estate. . . . And it is to be under her 'sole control,' and to be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried. . . . They designed to make and did make a radical change in the condition of a *femme covert*. She is unmarried, so far as her property is concerned, and can deal with it as she pleases. Having 'sole control' of it, there is no necessity of joining her husband in an action to recover it, or for trespasses upon it. The very object of the statute was to keep it out of the control of her husband, in any and every respect, that the wife should be wholly independent of him in regard to it."

Emerson v. *Clayton*, 32 Ill., 496-7.

So, since 1861, a married woman, when sued jointly with her husband, may plead separately from her husband, and whether her husband defends or not.

Schmidt v. *Postel*, 63 Ill., 58.

The act of 1861 enlarged the meaning of the term, "separate estate" (of a married woman) to include any property she might own at the time of her marriage, or might acquire in good faith during coverture from any one but her husband, whether by devise, descent or otherwise, and enabled her to devise such separate estate, although prior to 1861 she could only devise such separate estate as had been conveyed to trustees for her use. "It "was not the purpose of the act of 1861 to curtail or cir- "cumscribe the powers and rights of married women, but "to enlarge them."

Emmert v. *Hays*, 89 Ill., 16.

"The rights acquired by the husband by virtue of the marriage have almost all been taken away, and the disabilities of the wife have nearly all been removed. She now controls her own estate entirely except that, by construction of the courts (!), she cannot convey her real estate without her husband. *This, however, is solely for her protection*, and to prevent the squandering of the estate. *He has now only a modified tenancy by the curtesy, dependent upon a contingency, and no estate vests during the life of the wife.* This is rather a shadowy estate. It is an interest which may possibly ripen into something tangible in the uncertain future. Previous to the act of 1861, it could be sold on execution against the husband; now, the wife has the sole control of her real estate during her life, and *the husband has no interest until her death.*"

Martin v. *Robson*, 65 Ill., 132–3.

She is, since 1861, separately liable for costs of suit for maintaining her rights in her property.

Ibid.

The saving clause in statutes of limitation—in favor of a *femme covert* during coverture—was repealed by implication by the act of 1861, because thereby her control

over her property was established, and her disability to sue alone for its protection was removed.

Castner v. *Walrod*, 83 Ill., 177.
Enos v. *Buckley*, 94 Ill., 458.
Geisen v. *Heiderick*, 104 Ill., 537.

The act of March 27, 1869, provided:

"That any *feme covert*, being above the age of eighteen years, joining with her husband in the execution of any deed, . . . or other writing relating to the sale, conveyance or other disposition of lands, . . shall be bound . . by the same in respect to her right, title, claim, interest or dower in such estate, as if she were sole and of full age; and the acknowledgment or proof of such deed, etc., may be the same as if she were sole."

Pub. Sess. L. Ills., 1869, p. 359.

The Revised Statutes of 1874, provide:

"That a married woman may own in her own right real and personal property, . . . and manage, sell and convey the same to the same extent, and in the same manner, that the husband can property belonging to him."

Rev. Stat. Ills. 1874, Ch. 68, Sec. 9.

With this resumé of the past and present state of the law of Illinois on the subject, we are better prepared to demonstrate our position, that, within the meaning and spirit of the law *as it stood in 1856*, William Lynn did not "join" in this deed of his wife.

It will be noted that the act of 1847, recognizing the husband's supremacy and control and substantial existing interest in and over his wife's property, provides that the "*feme covert* . . . shall join with the husband," not that he shall join her. *He* is the *principal*. It must be *his deed*, quite as much as hers. They must so "join" that HIS *interest and title shall pass as well as hers*. Prior to the various "Married Women's Acts," was there ever

such a deed known as would pass the wife's interest, and not her husband's ! ! As was argued by Luther Martin and William Pinckney, in *Lawrence* v. *Heister*, 3 H. & J. (Md.) 371, "a married woman cannot convey her inheritance where nothing passes from her husband."

It was the policy of the common law, not only to protect the wife from strangers, but also from the selfishness of husbands. It was sought to protect her from strangers by securing to her the presence and counsel of her husband, and making his assent necessary. To protect her from her husband, she was required to be separately examined by an impartial officer away from the husband's influence.

And further it was required that her rights should not be affected unless the transaction was so fair that, at least, *her husband would be willing* at the same time and by the same instrument *to pass his own title and interest.* The law invoked in her behalf the same vigilance on the part of her husband, as he would be likely to exercise in his own behalf.

It will be observed that in favor of Mrs. Lynn the act of 1847 provides no such safeguard as the usual one of a privy examination before a magistrate. *All the greater need, therefore, of a strict compliance with* the letter and spirit of every requirement that would look to the *same* end.

The fact that William Lynn signed, sealed and acknowledged this deed is not sufficient to make him a party to it. *He should have been named or otherwise expressly designated in the body of the deed as a party grantor.*

In *Agricultural Bank* v. *Rice*, 4 How., 228, the following deed was passed upon:

"This indenture . . between W. M. Phipps, in right of his wife, Martha, W. R. Haile, in right of his wife, Mary . . of the one part, and N. B. of the other

part, witnesseth: That the said parties of the first part . . have granted . . all that certain lot . . and also all the estate, right, title, interest and property and claim whatsoever, in law or equity, of them the said parties of the first part, . . and the said parties of first part . . do covenant . . that the said parties of the first part, and their heirs, the above premises unto the said parties of the second part . . against the said parties of the first part and against all persons, &c., will warrant and defend.

"In witness whereof the said parties of the first part have hereunto set their hands and seals.

"WM. M. PHIPPS. [SEAL.]
"MARTHA PHIPPS. [SEAL.]
"W. R. HAILE. [SEAL.]
"MARY HAILE," &C. [SEAL.]

"STATE OF MISSISSIPPI, }
ADAMS COUNTY. }

"Personally appeared . . W. M. Phipps and Martha, his wife, and W. R. Haile, and Mary Haile, his wife, &c., and acknowledged that they signed, sealed and delivered the within deed * * for the purposes therein contained. And Martha Phipps and Mary Haile, wives of W. M. Phipps and W. R. Haile, having been examined separate and apart from their husbands and acknowledged that they signed, sealed and delivered the same as their act and deed, free of compulsion of their said husbands, &c., &c. N. W. COLMES, *J. P.*"

This deed was made in pursuance of a formal bond for conveyance executed by the same parties and their wives. This court felt, however, no difficulty or doubt in declaring this deed *void* as to any rights of the wives, because the latter were not properly made parties thereto, saying:

"In order to convey by grant, the party possessing the right *must be the grantor* and use apt words to convey to the grantee, and *merely signing and sealing and acknowledging an instrument in which another person is grantor is not sufficient.*"

That decision was followed and applied in *Batchelor* v. *Brereton*, 112 U. S., 396.

"A woman who had not joined with her husband in a sale or mortgage is not barred of her dower. . . . For this purpose her assent by joining with her husband in the deed is sufficient; but in a sale or grant of real estate, when the title proceeds from her, the husband and wife are *as one grantor*. They act *together* in her right, . . . she is to be joined with him *in the operative words and stipulations* of the conveyance. . . . In the case at bar . . . the title in fee simple is granted, bargained and sold by him; and her subsequent consent or relinquishment of her right is a consent to his conveyance; but she *cannot be said* to have *joined* with him in conveying a title which proceeded from her."

Lithgow v. *Kavanagh*, 9 Mass., 172.
Lufkin v. *Curtis*, 13 Mass., 223.
Melvin v. *Proprietors, &c.*, 16 Pick., 139.

In *Bruce* v. *Wood*, 1 Metc., 542, the husband, by deed in his own name only, undertook to convey his wife's land in fee, she affixing her signature and seal. The attestation clause read: "In testimony whereof, I, the "said Isaiah Bruce, and I, Mary Bruce, wife of Isaiah, "in token that I relinquish all my right in said bargained "premises, have hereunto set our hands and seals." It was duly acknowledged. *Held*, void as to the wife, because, "the wife must *join* in the deed; that is, it must "appear that *both husband and* wife were parties to the "*efficient* and *operative parts* of the instrument."

"A deed cannot bind a party sealing it, unless it con- "tains words expressive of an intention to be bound."

Catlin v. *Ware*, 9 Mass., 218.
Fowler v. *Shearer*, 7 Mass., 14.

This is just as true of Wm. Lynn, though he was a person *sui juris*, as it would have been of his wife.

Peabody v. *Hewitt*, 52 Me., 33, 50.
Chapman v. *Cooke*, 41 Mich., 595.
Harrison v *Simons*, 55 Ala., 514.

The Massachusetts act of 1836, Rev. Stat., Ch. 59, Sec. 2, provides:

"A husband and wife may by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed, if she were unmarried; but the wife shall not be bound by any covenant contained in such joint deed."

While this act was in force, a married woman, owning realty, attempted to convey by a deed beginning: "Know all men by these presents that I, Pamela E. "Davis, wife of Joseph Davis, . . . in my own "right, with the consent and approval of my said hus- "band, testified by his being a party hereto, etc." There was no further reference to the husband until the conclusion, as follows: "In witness whereof, I, the said Pamela "Davis, and I, Joseph Davis, husband of the said Pamela, "have hereunto set our hands and seals." This was signed, sealed and acknowledged by both. This was held *void*, the court saying:

"A *feme covert* who owns the fee of land can convey "the same only by a deed executed by herself and her "husband, and when *both* are *parties* to the *effective and* "*operative part* of the instrument of conveyance."

Jewett v. *Davis*, 10 Allen, 68.

The doctrine of the Massachusetts cases is also adopted in other courts.

McFarland v. *Febinger*, 7 Ohio, 1st pt., 194.
Purcell v. *Goshorn*, 17 *id.*, 105.
Cincinnati v. *Nexwell*, 7 Ohio St., 41.
Carter v. *Goodin*, 3 id., 78.

Payne v. *Parker*, 10 Me., 178.
Cox v. *Wells*, 7 Blackf., 410.
Whitely v. *Stuart*, 63 Mo., 360.
Powell v. *Munson*, 3 Mason, 348.
Davis v. *Bartholomew*, 3 Ind., 491.

Gray v. *Mathis*, 7 Jones L. (N. C.), 502, is precisely the case at bar. There a married woman made a deed purporting to convey her interest in land in her own name. Her husband was not named in the deed, but it was properly signed and sealed by both. Held, "void "as to her on account of the coverture; and as to him, "because not a party to it; and that no privy examina- "tion could give validity to such an instrument."

In Rhode Island the statute provided that "where the "husband and wife are seized of any lands in the right of "the wife, they shall be authorized to convey the same "by deed signed, sealed and delivered by them respec- "tively."

Rev. Stat. R. I., 1857, Ch. 136, Sec. 6.

Mrs. H., owning realty, executed a deed which, down to the attestation clause, was written as if it were the individual deed of Mary E. H., the wife of Thomas J. H. It read: "I, Mary E. H., wife of Thomas J. H.," etc. The attestation clause read as follows: "In testimony "whereof we have hereunto set our hand and seals," etc. It was duly signed, sealed and acknowledged by both, the wife's acknowledgment having been separately taken. This deed was held void, the court saying:

"How can a deed which is expressed solely in the name of one person become the deed of another person by his simply affixing to it his signature and seal. . . . This cannot be construed as the joint grant of husband and wife, with covenants by the husband, simply become, unless so construed, they are without effect. That would

be to make for the husband and wife a deed which they have not made for themselves. . . . The cases cited in support [of this deed] simply hold that a contract, will or bond will bind its subscribers as parties or makers, when the parties or makers are not named, or there is a blank to fill in the body of the instrument. This is not a case of that kind."

Warner v. *Peck*, 11 R. I., 431.

The statutes of Alabama (Code 1852, Sec. 1984; Rev. Code 1867, Sec. 2373) provided that "the property "of the wife may be sold by the husband and wife, and "conveyed by them jointly by instrument of writing."

In *Hammond* v. *Thompson*, 56 Ala., 590, the deed read:

"I, Martha A. O'Neal, wife of B. W. O'Neal, . . . have bargained, sold, etc. . . . all my undivided right and interest in the estate of my father, whether real or personal. In witness whereof, I have hereunto subscribed my name and affixed my seal, &c.

"MARTHA A. O'NEAL. [SEAL.]

"I, B. W. O'Neal, . . . husband of the within named Martha A. O'Neal, do hereby consent to and approve the sale and conveyance . . . of her undivided right and interest in the estate of her father, &c., upon the terms . . . in the foregoing . . . conveyance, &c.

"BASIL W. O'NEAL. [SEAL.]"

This instrument was acknowledged by both husband and wife, but was held insufficient to convey her title. Of the husband the court says:

"He did not assume to convey. Acting, and consent-"ing that another may act, are in law very different "transactions. O'Neal only consented that Mrs. O'Neal "should convey."

Precisely so here. The most favorable possible construction for the defendant that can be put upon the act

of William Lynn in signing this deed is, that he assented that Christina should convey.

"It may be thought," says the court, "that our ruling savors of technical strictness. It should be borne in mind, however, that it is a statutory power under which this conveyance is sought to be upheld. When regulations are prescribed by statute, not even courts of equity can dispense with their observance or remedy their omission, where they constitute the apparent policy and object of the statute. 1 Story Eq., Sec. 96."

It is not enough that the deed may witness the consent of the husband to her deed. He must join in the deed, be a party to it.

Powell v. *Monson Co.*, 3 Mason, 355.

In *Blythe* v. *Dargin*, 68 Ala., 370, the deed of the wife's fee was signed by both husband and wife, but the husband's name was not mentioned as grantor, nor were any words used indicating a purpose to pass the *husband's* estate. It was held *void*, and not even enforceable in equity, though the purchase money had all been paid and possession taken and held for five years thereunder.

"How is the concurrence of the husband to be shown? The statute prescribes the mode, and *that mode is exclusive*. . . . The deed cannot be styled the contract of husband and wife. It is no more nor less than the void deed of the wife, to which the husband is not a party, and *to which his concurrence is not expressed in the only mode in which the law authorizes its expression.*"

In *Lawrence* v. *Heister*, 3 H. & J. 371 (Md.) there was a statute allowing married women to acknowledge deeds outside the state, but, by some *casus omissus*, there was no like provision for acknowledgment by non-resident males. The general conveyancing act made acknowledgment essential to the validity of every conveyance of freehold or inheritance. A deed of the wife's fee signed, sealed and

acknowledged outside the state by both husband and wife was held invalid to pass her title, *because it did not also pass his.* Luther Martin and Wm. Pinkney, for the appellant, there contended: "That a married woman could not con-"vey her inheritance where nothing passed from her hus-"band"—and that view was sustained by the court. Among the opposing counsel were Francis Scott Key and R. B. Taney, the latter of whom as chief justice, subsequently delivered the opinion in *Agricultural Bank* v. *Rice, supra.* The Maryland act as to joining in the deed read: "If any *feme covert*, joining with her husband in "any conveyance, when the *feme covert* hath the right, "title, etc., by such conveyance intended to be granted, "she shall by such execution of said conveyance, etc., be "barred." The court (Chase, C. J.) says: "The legisla-"ture never intended the wife should pass her interest un-"less her husband, *as grantor*, joined in the deed."

The fallacy upon which, as it seems to us, the opinion and judgment of the court below are founded consists in giving to the supposed *intent* of Mr. and Mrs. Lynn the same effective operation as if she had been a party *sui juris.* But it must be remembered that the power of the wife to convey her realty is purely the *creature of statute.* Her deed "does not pass her interest by the force "of its execution and delivery, as in the common case of "a deed by a person under no legal incapacity."

Hepburn v. *Dubois*, 12 Pet., 375.
Lindley v. *Smith*, 46 Ill., 528.

"It may be said, in view of some of the cases cited decided by this court, that greater strictness is required where a married woman seeks to convey her own real estate, for the reason that the deed does not take effect by delivery."

Kerr v. *Russell*, 69 Ill., 668.

The defective execution of a statutory power is not even remediable in equity, though if the power were conferred merely by an individual, it would be otherwise.

1 Story Eq., Sec. 96.

Young v. *Dowling*, 15 Ill., 481.

This rule is applied to the case of a *feme covert's* conveyance of her own realty in *Rogers* v. *Higgins*, 48 Ill., 215, and in *Hammond* v. *Thompson*, 56 Ala., 590.

The opinion of the court below is founded upon three decisions of the Illinois Supreme Court. But it will be noted that in each case, beside other points of distinction, the deeds construed, as well as the decisions construing them, were made subsequent to the act of 1861, *at a time when the whole spirit and policy of the law in regard to the wife's property rights had become radically different* from the law that prevailed in 1856.

We submit that a deed made in 1856 cannot, with any propriety, be construed in the light of, or in compliance with, doctrines and rules which had no existence until long after. The legal effect of this deed must be adjudged according to the act of 1847, and that act cannot be made to mean one thing in 1856 and another thing in 1886. Changes in public sentiment cannot operate to change the meaning of a legislative enactment. "Any "other rule of construction would abrogate the judicial "character of the court, and make it a mere reflex of the "popular opinion or passion of the day."

Dred Scott case, 19 How., 426.

We proceed now to point out and illustrate the distinctions between the case at bar and the cases cited in support of the judgment below:

The decisions relied upon below are *Johnson* v. *Mont-*

gomery, 51 Ill., 185; *Miller* v. *Shaw*, 103 Ill., 277, and *Yocum* v. *Lowell*, 111 Ill., 212.

In *Johnson* v. *Montgomery*, the question was not as to the wife's *fee*, as here, but only as to her *dower*, and it was held that her signature with her husband and her acknowledgment in due form, professing to relinquish her dower, would suffice *to relinquish her dower*, though she might not be named in the body of the deed as a grantor. But the court, in so many words, *expressly decline* to pass upon the very question at issue here, seeming thereby to intimate a clear distinction, saying:

"Much stress is laid upon the second section of the act of 1847 [the act *here* in controversy] in regard to deeds executed by married women out of this state, but, *independently of that statute*, we are of opinion *this* deed and acknowledgment amount to a valid relinquishment of *dower* under *the act of 1845*. The act of 1847 refers not only to deeds executed by married women out of the state for the purpose of releasing dower, *but also to cases where the* FEE *is in the wife*, and what *would be the effect in* SUCH *cases of* SUCH a *deed as that before us is a question we* DO NOT PROPOSE TO DECIDE."

The court then proceeds to distinguish the *Massachusetts* cases upon the ground that the statutes of that state provide no such safeguard as prevails in Illinois in the shape of a privy examination, to secure the wife from her husband's influence. But *this distinction fails* in the case at bar, because *the act of 1847*, just like the Massachusetts statutes, *is without such provision for the wife's protection*, but permits the same sort of acknowledgment as would suffice in a case of a *femme sole*.

Again, the court, in *Johnson* v. *Montgomery*, points out the difference between *dower* and *fee*. The former is not the proper subject of a *grant* at all; it is incapable of

conveyance to any one but the owner of the fee. It is not an estate, but is simply a privilege that is "relinquished" or "released." Its release operates not as a transfer of title or interest, but by way of estoppel. The courts of Massachusetts recognize the same distinction, *Tirrell* v. *Kenney*, 137 Mass., 32, and Judge Drummond, construing the Illinois statutes on the subject, also notes this difference:

"In the case of dower, the wife *grants* nothing. She joins in the deed, and makes the proper acknowledgment to relinquish her dower. In the case of a conveyance by a *femme covert* of her *estate*, she executes the deed to grant the inheritance, and, as has often been decided, the deed must contain words of grant," citing *Agricultural Bank* v. *Rice*, 4 How., 241.

Lane v. *Dolich*, 6 McLean, 203.

So the court, in *Johnson* v. *Montgomery*, says:

"We are wholly unable to appreciate the importance of apt words of *grant* to be used by the wife in the body of the deed for the purpose of cutting off her *dower*, when in fact she is not possessed of an estate in the land which is susceptible of conveyance, but merely of a contingent interest, which can only be *released* for the purpose of being merged in the fee."

So in *Kerr* v. *Russell*, 69 Ill., 668, it was said:

"It may be said, in view of some of the cases cited, decided by this court, that *greater strictness is required* where a married woman seeks to convey *her own real estate*, for the reason that the deed does not take effect by delivery, as in the case of a conveyance by a husband and wife conveying *his* estate, in which the wife has but an inchoate, uncertain and expectant interest, which may never be consummated. In the first case her deed becomes operative only by her acknowledgment in the mode prescribed by the statute. Until so acknowledged it has no vitality. In the latter case, the great purpose of the law is subserved, that her relinquishment of this uncertain right is not obtained by fraud or compulsion, but is her own free and voluntary act."

In other words, the sole effect of the decision in *Johnson* v. *Montgomery* is that, under the act of 1845, a married woman "joins" in a deed by signing and acknowledging it, *when the sole purpose is* to relinquish *dower*, a right which is but a "contingent interest," not "susceptible of conveyance," but only of release "for the purpose "of being merged in the fee," an "inchoate, uncertain and "expectant interest which may never be consummated."

If such were the character of William Lynn's interest in his wife's land in 1856, then that decision might be pertinent. But such was not the case. *His* interest was a real, *substantial*, *existing* interest, capable of *present* enjoyment. He could have leased this land in his own name, and without his wife's assent, and could have appropriated all the rents to himself. He could have sued alone for its protection against trespassers. During their joint lives, her legal existence, so far as the enjoyment of this land was concerned, was merged in that of her husband. They constituted but one person, and he was that person.

Therefore, when he signed this deed, nothing could have been more appropriate than that he should sign it as *grantor* in token, not that he *released* a mere "inchoate uncertain" right that "might never be consummated," but that he *conveyed* a present freehold *estate*, such an estate as can pass only by grant.

Now, compare this dower interest of the wife (which required not that the owner should sign as a "grantor,") with the husband's interest in his wife's realty AFTER *the act of 1861*. We shall see that precisely the same reasons which would make her signature a sufficient "joining" in the deed, where the purpose was to release dower, would also suffice to constitute his mere signature

a "joining," where the purpose was to release the inchoate, uncertain interest left in him by the act of 1861, an estate incapable of present enjoyment, one which does not vest at all during his wife's life and which never may vest, not available for his debts, for the protection of which he cannot maintain suit.

Martin v. *Robson*, 65 Ill., 132–3.
Beach v. *Miller*, 51 Ill., 209.

Why, after 1861, should the husband join as a "grantor" in a deed of his wife's land? His joining is still necessary to protect the wife from the imposition of strangers, but as he has no present interest and no control over the property himself that could pass by the deed, this "joining" is an essentially *different act* from the "joining" required by the act of 1847. This distinction is thus noted by a text writer:

"At common law he [the husband] *had an estate to convey*, and *it would seem that he had to join as co-grantor;* but when the whole estate is vested in the wife, and his assent is required to prevent imposition, his mere signature to the deed is enough, and he need not be named in the body of the deed."

Stewart on Husband and Wife, Sec. 399.

In *Meagher* v. *Thompson*, 49 Calif., 191 (quoting 12 Calif., 576), it is said concerning a conveyance by a *feme covert* of land held by her as her *statutory separate estate* under a law *similar to the Illinois married woman's act* of 1861:

"The estate is confessedly in the wife; *her* title it is that is to pass; *the joining of the husband is not for the purpose of passing the title.* It is only as a precaution against imposition . . . or to evidence his renunciation of the right to manage and control it."

So in *Douglas* v. *Fulda*, 50 Calif., 80, it is said of a

lease by a *feme covert* of property acquired by her *after the passage of the act giving her a separate estate:* "It "was her estate only that was to be affected by the lease. "The act requires the signature of the husband *not for* "*the purpose of passing any title from him*, but as a pre- "caution against imposition;" citing 12 Calif., 576.

The case in 12 California (*Ingoldsby* v. *Juan*), still further illustrates this. The property was held by a *feme covert*, under a constitutional provision to the effect that "all property, real and personal, of the wife, owned "by her before marriage, and that acquired afterwards "by gift, devise or descent, shall be her separate prop- "erty." The conveyance was signed, sealed and acknowledged by her. But her husband did not sign at the foot of the deed itself, but at the bottom, after the acknowledgment, he added the words: "I have read "the foregoing and fully agree with the conveyance made "by my wife—LEWIS DEPEAUX." Then follows an acknowledgment by him that he "executed the foregoing "instrument freely and voluntarily, and for the uses and "purposes therein expressed."

It was objected to this deed that the husband should have been, but was not, a party grantor therein. But the court says:

"In terms he agreed to the conveyance. It is true this agreement was not under seal. The agreement did not convey title, *for he had none to convey*. If he had signed and sealed the deed as an express party named in the premises thereof, the result would have been the same. All that his formal execution of the deed could have done would have been a signification of his assent and agreement. *Having no estate in the land*, unquestionably the law would not require of him the vain act of pretending to convey title."

None of this language is at all applicable to the Lynn

deed or to rights which William Lynn had in and to this land of his wife's in 1856, *however applicable it might have been, in case the land had vested in Christina* SUBSEQUENT *to our act of 1861.*

In *Friedenwald* v. *Mullan*, 10 Heisk., 231, the wife held under a deed to "*her sole use*," or, as the court says:

"The estate is conveyed solely to the wife; *the hus-*
"*band by the terms of the deed, took no title to it.*"

This estate the wife was allowed to convey by a deed purporting to be her sole deed and containing covenants of seizin and warranty by her a lone. She is recited to be "the wife of J. M." Otherwise his name appears only in the attestation clause. Both of them signed and sealed and acknowledged the deed. The court held this sufficient to convey the fee, though the husband was not a party grantor, saying: "Why should he, upon the face of "the deed, be required to say that he conveys, and is "seized and possessed, and has good right to convey "*when these covenants as to land belonging to his wife are* "*not true?* All that is required of him to signify his "*assent* and *presence* is his signature."

In *Hills* v. *Bearse*, 9 Allen, 405, cited in the last case, 10 Heisk., there was a conveyance of the wife's *separate* estate, with reference to which the Massachusetts act provided that it should not pass "without the *assent* of the husband in "writing *or* his joining with her in the conveyance." It was held that his signature to her deed of *such* an estate would suffice. But the separate estate capable of being so conveyed is defined by the statute of the same state as being "her sole and separate property" and such as "may be used, collected and invested by her in her own "name, and shall not be subject to the interference or "control of her husband or liable for his debts."

Gen. Stat. Mass., 1860, p. 537.

These considerations dispose of *Miller* v. *Shaw* as an authority in support of the Lynn deed. As was said of the act of 1861:

"Such a change in the relative rights and powers of husband and wife must, of necesssity, give a different operation to the rules of law, by which they are to be governed."

Emerson v. *Clayton*, 32 Ill., 496–497.

We find from the record of that case in the lower court that the property was acquired by the wife, whose deed was in controversy, on December 5, 1866, that is, *after* the act of 1861. Further, in that case, there is abundance on the face of the deed itself to indicate that the husband was a party to it.

Said deed was as follows:

"This indenture, made this 8th day of February, in the year of our Lord one thousand, eight hundred and sixty-seven, between L. Martha Sheldon, in her own right, wife of Seth Sheldon, Jr., of the first part, and Horatio F. Ward, of Berlin, Green Lake county, state of Wisconsin, of the second part:

"Witnesseth: That the said party of the first part, for and in consideration of the sum of $4,800 in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents do grant, bargain and sell unto the said party of the second part, his heirs and assigns, all the following described lots, pieces, or parcels of land, situate in Hyde Park, in the county of Cook and state of Illinois, to wit: (describing same), together with all and singular the hereditaments and appurtenances thereunto belonging, or in in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part, either in law or equity, in and to the above bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises

above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

"And the said L. Martha Sheldon and Seth Sheldon, Jr., party of the first part, hereby expressly waive, release and relinquish unto the said party of the second part, his heirs, administrators, executors and assigns all right, title, claim, interest and benefit whatever in and to the above described premises, and each and every part thereof, which is given by or results from the law of this state pertaining to the exemption of homesteads. And the said L. Martha Sheldon and Seth Sheldon, Jr., party of the first part, for their heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the sealing and delivery of these presents they are well seized of the premises above conveyed, or of a good, sure, perfect, absolute and indefeasible estate of inheritance in law and in fee simple, and have good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments and encumbrances of what kind and nature soever, and the above bargained premises, in the quiet and peaceful possession of said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

"In testimony whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

"L. MARTHA SHELDON, (SEAL.)
"SETH SHELDON, JR. (SEAL.)"

The utter variance in all material features between such a deed and the Lynn deed suffices, of itself, to dispose of *Miller* v. *Shaw* as a precedent for the decision below.

The remaining case relied on by defendant is *Yocum* v. *Lowell*, 111 Ill., 217.

That case relates simply to relinquishment of *homestead*,

an interest, which, whether dignified with the title of an "estate" or not, is assuredly very different from the interest of Mr. and Mrs. Lynn in this land in 1856. The statute providing for the mode of its extinguishment (Rev. Stat. Ill., 1874, Chap. 52, Sec. 4) describes the instrument of alienation as a "*release* or *waiver* or conveyance." The instrument need only be "subscribed," need not be executed in the form of a deed of conveyance at all. The estate, indeed, "sustains a strict analogy to the right of "dower. Either may be released to the alienee of the fee "so as to merge therein, but neither can be aliened separ- "ately."

Thompson on Homestead, Sec. 452.

"The fallacy of the argument lies in the assumption that the release of the right of homestead operates as a *grant* of the right, so that it may be enjoyed by the grantee. This is not the operation of a release in whatever form of words it may be made. Like a release of dower it operates not to convey the right to another, but by way of estoppel or extinguishment of the right so as to bar any future claim."

Tirrell v. *Kenney*, 137 Mass., 32.

The distinctions drawn in *Johnson* v. *Montgomery*, 51 Ill., between a grant of the fee and a mere release of dower are applicable. In neither case is it necessary or even strictly appropriate for the party releasing the right to be named as a party *grantor*. See Judge Drummond's opinion in *Lane* v. *Dolick*, 6 McLean, at page 203.

Even if these decisions of the Supreme Court of Illinois could be understood as referring to and construing the act of February 22, 1847, under which the Lynn deed was executed, (which is very far from being the case), yet they are in nowise binding upon this court, because the construction of that act was not involved in or neces-

sary to a decision in those cases. At best they but assert general principles.

Town of Venice v. *Murdock*, 92 U. S., 494.

The expressions in the opinions of the Supreme Court of Illinois being mere *obiter*, so far as relates to the questions at issue here, this court is in nowise bound by them, even though they relate to the construction of local statutes.

In a case wherein the Court of Appeals of Maryland had delivered a somewhat elaborate opinion upon the construction of a Maryland statute, the Supreme court of the United States says:

"If the Court of Appeals had found it *necessary* to construe a statute of that state in order to decide upon the rights of the parties, such a decision, deliberately made, might have been taken by this court as a basis on which to rest our judgment. *But it must be remembered that we are bound to decide a question of local law upon which the rights of parties depend, as well as every other question, as we find it ought to be decided.* . . . If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought in question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. . . . With these views we cannot regard the opinion of the Court of Appeals as an authority on which we have a right to rest our judgment."

Carroll v. *Carroll*, 16 How., 286–7.

And this rule has been applied on the circuit to the construction of the Illinois statutes relating to conveyances by married women.

Lane v. *Dolick*, 6 McLean, 208–9.

We may suggest, as a possible explanation of the defective manner in which the Lynn deed is executed on the part of William Lynn, that in 1856 there existed in Michigan a constitutional provision similar to the Illinois Married Women's act of 1861, and that the deed was perhaps drawn up in Michigan by the justice of the peace before whom it was acknowledged, and that the draughtsman's views of the purpose of the husband's joinder in the deed were founded upon his knowledge of the local law of Michigan.

Constitution of Michigan, 1850, Art. 16, Sec. 5.

We may say further that, if this deed be wanting in the technical statutory requisites, we are prepared on the trial to give excellent reasons why the court should not be astute in sustaining the deed in favor of the grantees therein.

The remaining objection to this deed is that *the certificate of acknowledgment does not comply with the statutory requirements.*

That such compliance was then essential to the validity of a *femme covert's* deed, see

Tully v. *Davis*, 30 Ill., 103.
Lindley v. *Smith*, 46 Ill., 523.
Murphy v. *Williamson*, 85 Ill., 152–3.
Lane v. *Dolick*, 6 McLean, 204.

The omissions or defects in the certificate cannot be supplied by parol.

Elliott v. *Peirsoll*, 1 Pet., 320.
Lindley v. *Smith*, *supra.*

The defects in the certificate affixed in the Lynn deed are:

First. It does not appear that Mrs. Lynn was "*personally*" known to the magistrate, or that she was proved by a credible witness to be the same person as the subscriber to the deed.

Second. It does not appear that she was informed of the contents of the deed.

See the Act of 1845, pp.——, *ante.*

It is true, the act of 1847, permits the non-resident *feme covert* to acknowledge her deeds "as if she were *sole.*" But this simply means that the privy examination is dispensed with.

In, at least, the first of the particulars mentioned above, this acknowledgment would not entitle this deed to record, even if the maker had been a *femme sole.*

Note the care with which the statute (*ante*, pp.) requires the officer to state the *means of his information or the evidence* as to the grantor's identity. It is true that if Mrs. Lynn was "known" to the officer, as the certificate states, she must have been either "personally" known, or proven by credible witnesses, but this leaves it uncertain which, and it was the purpose of the statute *not* to leave this point uncertain.

Shephard v. *Carriel*, 19 Ill., 319.

Of a certificate which recited that "personally appeared before me, Ira Davenport, to me known to be the "person described in, and who executed the above deed, "and acknowledged, etc., etc.," the court in *Buell* v. *Irwin*, 24 Mich., 153, says: "It is by no means certain "that a court would be justified in holding that it sufficiently shows that the grantor was *personally* known "to the commissioner."

Compare the certificates which, in the Illinois cases last above cited, were declared insufficient.

The act of 1853 (proposing to cure defects in the statements of the certificate) does not dispense with these requirements.

Lindley v. *Smith*, 46 Ill., 527.

See the late case of a deed made in 1857.

Coburn v. *Herrington*, 114 Ill., 106.

The latter deed was twice before the Supreme court, and both times declared invalid.

Herrington v. *Coburn*, 108 Ill., 615.

This certificate does not even comply with the Michigan act then in force, which provides that

"When any married woman residing in this state shall join with her husband in a deed of conveyance of real estate situate within this state, the acknowledgment of the wife shall be taken separately and apart from her husband, and she shall acknowledge that she executed such deed freely and without any *fear* or compulsion from any one."

Compiled Laws Mich. 1857, Ch. 88 Sec. 12.

The certificate to the Lynn deed states that Mrs. Lynn acknowledged that she "executed said deed without any "*force* or compulsion from her said husband or from any "one."

We submit that the variance is a very substantial one. There might well be "fear" without "force." This certificate does not exclude the idea that there was "fear." The statute meant that in such case the deed should be of no effect.

But even if this certificate can be considered as conforming to the Michigan statute, the result is ***not that the***

deed is thereby made effectual to convey the wife's estate, but simply that the deed can be *admitted to record* in Illinois. The Illinois act may accept the Michigan form of certificate as satisfactory proof that the persons purporting to sign this deed were, in fact, the persons who did sign it, but it is contrary to precedent and reason to suppose that the Illinois legislature meant thereby to adopt the laws of Michigan as controlling and defining the *legal effect* of such deed, or the respective rights of the husband and wife in each other's realty here situate.

By the laws of Michigan in 1856 Mrs. Lynn held her realty there situate independent of her husband, and free from his control and his debts. In the other states of the union, still other provisions, varying and conflicting, prevailed. Did this act of 1847 as to foreign acknowledgments adopt all these foreign laws? Suppose the case of a married woman, resident in Massachusetts, executing in Ohio a deed for land in Illinois; or, suppose several married women, joint owners of realty in Illinois, but resident each in a different state, to execute a joint deed of their interest. Which law is to prevail as to the *legal effect* of the instrument? Plainly, there must be but one law for them all in this regard, and that must be the law of Illinois, though the certificate of acknowledgment of each may differ from the others.

And so the third section of the act of February 22, 1847, provides that when a deed is acknowledged elsewhere in conformity with the law of the state where executed, it "shall be admitted to record, * * * and "when so recorded may be used as evidence *without* "*further proof of the execution thereof*."

1 Gross' Stat. Ill., Tit. "Conveyances," Sec. 29.

But says not one word as to the *legal effect* of the instrument when proved.

See the latter part of the second section of the same act, which authorizes a non-resident *femme covert* to acknowledge deeds "the same as if she were sole," describing the effect of such acknowledgment to be that it "shall entitle such deed . . to be *recorded*," &c.

Ibid, Sec. 24.

The fact is, the certificate of acknowledgment in the case at bar is not in compliance either with the laws of Michigan or those of Illinois.

"Where a party rests on the law of another state, a "compliance in all essential particulars must be shown "with that law; if on the law of this state, a like com- "pliance with its provisions. The laws of both states can- "not be invoked in aid of an acknowledgment manifestly "defective when tested by either."

Adams v. *Bishop*, 19 Ill., 398.
Montag v. *Linn*, *id.*, 401.

It is, therefore, submitted that the deed from Christina Lynn to Milton and Thomas C. McEwen was not valid, and that therefore the court was not justified under the stipulation in finding for the defendant.

Respectfully submitted.

S. Corning Judd,
Albert Ritchie,
William Ritchie,
Edward B. Esher,
Edward S. Judd,
Counsel for Plaintiff in Error.

120-375

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UNITED STATES OF AMERICA.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

BRADLEY G. SCHLEY,
Plaintiff in Error,
vs.
PULLMAN'S PALACE CAR COMPANY,
Defendant in Error.

EJECTMENT.

STATEMENT

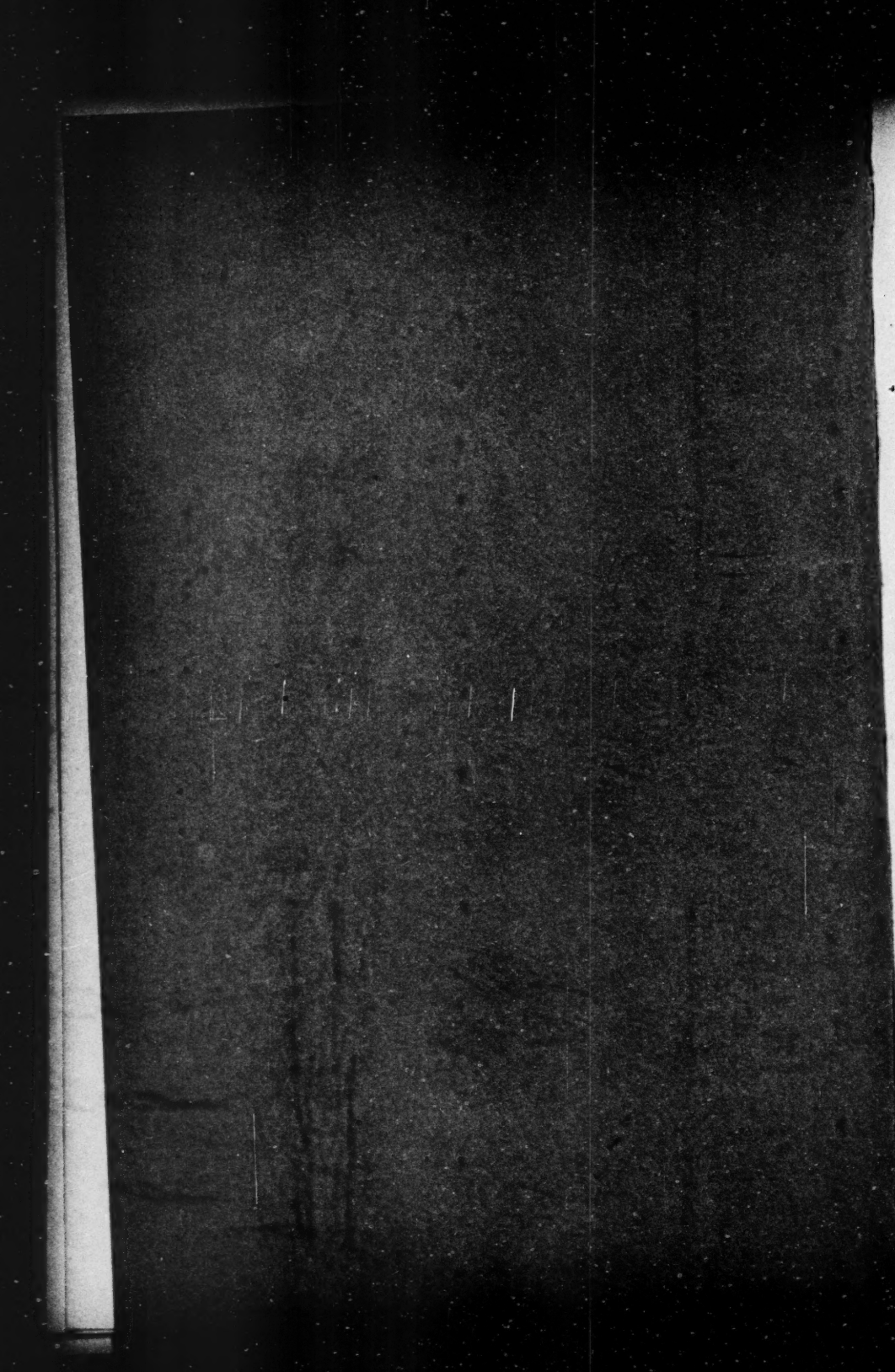
AND

ARGUMENT FOR DEFENDANT IN ERROR.

BY

ALFRED ENNIS,
GENERAL COUNSEL PULLMAN'S PALACE CAR COMPANY.

CHICAGO:
BARNARD & GUNTZENDAN, LAW PRINTERS, 74 & 76 LASALLE STREET
1886.



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BRADLEY G. SCHLEY,
Plaintiff in Error,
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Defendant in Error.

EJECTMENT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT.

This was a suit in Ejectment commenced in the Circuit Court of the United States, for the Northern District of Illinois, on July 29, 1885, by Bradley G. Schley, *the plaintiff in error*, against Pullman's Palace Car Company, *the defendant in error*, to recover an undivided half interest in certain real estate in Cook County, in Illinois, being part of the *quarter section described in the declaration herein*, and upon which the Town of Pullman is in part located, the suit being founded upon a *pretentious fabrication*, and consequently upon an *unreal* and an *unjust* claim.

Declaration.

The declaration filed by the Plaintiff in Error was in the usual form of a declaration in ejectment.*

Answer.

The answer filed by the Defendant in Error was a General Denial, or Plea of not Guilty.†

Proceedings.

That when the suit came on for hearing upon the issues joined, judgment was rendered in favor of the Defendant in Error. The record of the proceedings had is as follows:

"Come now the parties to the above and foregoing "entitled suit, the *plaintiff* and the *defendant* therein, "by their respective counsel therein, *and by mutual "agreement in open court, a first trial of such suit is "waived by each party, a jury in such suit is also waived "by each party, and a second trial of such suit, to which, "upon the payment of costs, either party would be entitled "as of right under the laws of the State of Illinois, is now "entered upon by the court upon a stipulation between the "parties, as follows*—that is to say, that if the court "shall find to have been valid and binding a certain "deed of conveyance, dated May 26, 1856, executed "by Christina Lynn and William Lynn, her husband, "to Milton McEwen and Thomas C. McEwen, which "is in words and figures following:

"'This indenture, made this twenty-sixth day of May, in the "'year of our Lord one thousand eight hundred and fifty-six, wit-

* See Transcript of Record, page 2.

† See Transcript of Record, page 4.

"'nesseth: That I, Christina Lynn, sister and heir-at-law of Henry "'Millspaugh, deceased, who was a recruit of Lieutenant T. W. Den- "'ton, of Thirteenth regiment, United States infantry, war of 1812, "'with Great Britain, of the County of St. Clair, and State of Michi- "'gan, party of the first part, in consideration of the sum of forty- "'three dollars in hand paid by Milton & Thomas C. McEwen, of "'the County of Orange and State of New York, party of the second "'part, the receipt of which is hereby acknowledged, do hereby "'release, grant, bargain, and quit-claim unto the said party of the "'second part, their heirs and assigns, forever, all her right, title, "'claim and interest in that certain tract of land granted by the "'United States unto David Millspaugh and Christina Lynn, the "'brother and sister and only heirs-at-law of Henry Millspaugh, de- "'ceased, as follows, to wit: The south-east quarter of section num- "'bered fifteen (15), in township numbered thirty-seven (37), north, "'of range numbered fourteen (14) east, in the district of lands sub- "'ject to sale at Chicago, State of Illinois, containing one hundred "'and sixty acres, as by letters patent, bearing date November "'twenty-third, in the year of our Lord one thousand eight hundred "'and forty-nine, and founded upon warrant number 27,495, refer- "'ence being made to said patent, will more fully appear; to have "'and to hold the said premises, with all the appurtenances there- "'unto belonging or in anywise appertaining, to their only proper "'use, benefit and behoof of said parties of the second part, their "'heirs and assigns, forever.

"'In witness whereof the said grantor– have hereunto set our hands "'and seals the day and year first above written.

"CHRISTINA LYNN. (SEAL.)
"WILLIAM LYNN. (SEAL.)

"'Signed, sealed and acknowledged in presence of—
"'MARY A. LYNN,
"'OBED SMITH.'

"'STATE OF MICHIGAN, COUNTY OF ST. CLAIR; ss.:

"'On this twenty-seventh day of May, A. D. 1856, before me, a "'justice of the peace in and for said county of St. Clair, personally "'came Christina Lynn and William Lynn, her husband, known to

" ' me to be the persons who executed the foregoing instrument, and
" ' acknowledged the same to be their free act and deed; and the said
" ' Christina Lynn, having been by me privately examined separate
" ' and apart from the said husband, and fully understanding the con-
" ' tents of the foregoing instrument, acknowledged that she executed
" ' said deed freely and without any force or compulsion from her said
" ' husband or from any one.

" ' OBED SMITH,
" ' *Justice of the Peace.*'

" THEN AND IN THAT EVENT, THE FINDING AND JUDGMENT " OF THE COURT IS TO BE FOR THE DEFENDANT, that is, the " defendant is not guilty.

" That the said deed of conveyance being submitted to " the court, and argument of counsel for the respective " parties being heard, *and the court, being duly advised in* " *the premises*, DOTH FIND FOR THE DEFENDANT; that the " said deed of conveyance *was valid* and *binding* from " the said Christina Lynn and William Lynn, her hus- " band, to the said Milton McEwen and Thomas C. Mc- " Ewen, to all their, the said Christina Lynn's and Will- " iam Lynn's, her husband's, right, title and interest in " and to the real estate therein described.

" That the plaintiff by his counsel, thereupon moves " the court for a new trial of such suit, and the argument " of counsel, for the respective parties, being heard, " and the court, being duly advised in the premises, " *overrules such motion*, to which ruling and opinion of " the court the plaintiff at the time excepts; *that in pur-* " *suance of such finding and ruling of the court judgment* " *is accordingly entered in favor of the defendant and* " *against the plaintiff.*

" It is thereupon *considered and adjudged by the court* " *that said defendant be discharged*, and that it go hence " without day, and that it have and recover of said

"plaintiff its costs in this behalf expended, amounting "to —— dollars and —— cents, and that it have exe- "cution therefor."*

The foregoing *proceedings, finding and judgment of the court*, were also had in *two other* like suits *pending at the same time, in the same court, before the same Judge*, to recover part of the same quarter section described in the declaration herein, in *both* of which suits, *the plaintiff in error herein*, was THE PLAINTIFF THEREIN, and in one of which, the Pullman Land Association was *the defendant therein*, and in the other of which, the Allen Paper Car Wheel Company was *the defendant therein*.

OPINION OF THE COURT.

That at the time of announcing the finding for, and the rendering of judgment in favor of, *the Defendant in Error*, the court, Judge GRESHAM, presiding, filed a written opinion applicable to all three suits, as follows:

"GRESHAM, J.: These are actions in ejectment to re- "cover lands upon which the city of Pullman in part "stands. *Juries were waived and the cases were submitted "to the court upon a stipulation that, if the following in- "strument was held valid and binding as a deed of con- "veyance by husband and wife, judgments should be entered "for the defendants:*

"'THIS INDENTURE, made this 26th day of May, in the "'year of our Lord one thousand eight hundred and "'fifty-six, witnesseth: That I, Christina Lynn, sister "'and heir-at-law of Henry Millspaugh, deceased, who "'was a recruit of Lieutenant T. W. Denton, of 13th

* See Transcript of Record, pages 9 and 10.

"'regiment, United States infantry, war of 1812, with
"'Great Britain, of the County of St. Clair and State of
"'Michigan, party of the first part, in consideration of
"'the sum of $43 in hand paid by Milton and Thomas
"'C. McEwen, of the County of Orange and State of
"'New York, party of the second part, the receipt of
"'which is hereby acknowledged, do hereby release,
"'grant, bargain and quit-claim unto the said party of
"'the second part, their heirs and assigns forever, all
"'her right, title, claim and interest in that certain
"'tract of land granted by the United States unto
"'David Millspaugh and Christina Lynn, the brother
"'and sister and only heirs-at-law of Henry Millspaugh,
"'deceased, as follows, to wit: The south-east quarter
"'of section numbered fifteen (15), in township num-
"'bered thirty-seven (37), north, of range numbered
"'fourteen (14), east, in the district of land subject to
"'sale at Chicago, State of Illinois, containing one hun-
"'dred and sixty acres, as by letters patent bearing date
"'November twenty-third, in the year of our Lord one
"'thousand eight hundred and forty-nine, and founded
"'upon warrant No. 27,495, reference being made to
"'said patent, will more fully appear; to have and to
"'hold the said premises, with all the appurtenances
"'thereunto belonging or in any wise appertaining to
"'their only proper use, benefit and behoof of said
"'parties of the second part, their heirs and assigns
"'forever.

"'In witness whereof the said grantor- have here-
"'unto set our hands and seals the day and year first
"'above written.

"'CHRISTINA LYNN, [SEAL.]
"'WILLIAM LYNN, [SEAL.]'"

" Following is the certificate of Obed Smith, a justice " of the peace of St. Clair County, Michigan, dated May " 27, 1856. The officer certified that on that day " Christina Lynn and William Lynn, her husband, per- " sonally appeared before him; *that he knew them to be* " *the persons who executed the foregoing instrument;* that " they *acknowledged* it to be their free act and deed; *and* " *that after he had personally examined the wife, separate* " *and apart from her husband, and had fully informed her* " *of the contents, she acknowledged that she executed the* " *same freely and without conpulsion from her husband.*

" Section 2 of the act of February 22, 1847 (2 " Scates, Treat & Blackwell's Ill. Stat., 965), declares " that when any married woman, above the age of " eighteen years and not residing in this state, JOINS " *with her husband in the* EXECUTION *of any deed, mort-* " *gage or conveyance of any real estate situated within Illi-* " *nois, she shall be barred thereby of all the estate, right,* " *title, interest and claim of dower therein the same as if* " *she were unmarried and of full age;* and it is further " declared that such a *married woman may acknowledge* " *such deed, etc., as if she were unmarried.* This statute " was in force when Mrs. Lynn and her husband *exe-* " *cuted the deed in Michigan, where they then resided, and* " *she was at that time above the age of eighteen.* It is in- " sisted by counsel for the plaintiff that the statute re- " quired the husband to be a *joint grantor with his wife;* " that his mere *signing, sealing and acknowledging the* " *deed* was not sufficient when his name did not appear in " the granting clause or body of the instrument, and " that it was, therefore, inoperative and void. It was " only in substantial compliance with this statute that " the wife could convey title to her lands. The husband

" was required to JOIN her in the EXECUTION of a deed.
" Did the husband JOIN in the EXECUTION of this deed?
" That *he intended to do so and thought he had, admits of*
" *no doubt*, and it is equally clear that both the *wife* and
" *husband* undertook, *in good faith*, to convey their *entire*
" *interest and estate* in the premises to the grantees. The
" husband *signed, sealed* and *acknowledged* the deed to
" *enable* his wife to convey her title and to *convey* any
" claim or right, present or contingent, that he had in
" the land. *The wife and her husband rested, and no doubt*
" *died, in the belief that they had* JOINED *in the* EXECUTION
" *of a deed in compliance with the statute, and it remained*
" *for some one, after the lapse of twenty-nine years, to dis-*
" *cover, as he supposed, that they had utterly failed to accom-*
" *plish what they undertook to do and what they supposed they*
" *had done.* COURTS SHOULD UPHOLD DEEDS AND OTHER CON-
" TRACTS WHEN THE INTENTION OF THE PARTIES IS CLEAR.
" Although the husband's name does not appear in the
" body of the deed, *he signed, sealed and delivered it and*
" *thus* JOINED *his wife in its* EXECUTION.

" *Johnson* v. *Montgomery*, 51 Ill., 185, was a suit for as-
" signment of dower. On January 26, 1853, Johnson, a
" resident of Ohio, executed in that state a deed con-
" veying his lands in Illinois to Montgomery. Johnson's
" wife signed the deed with her husband and acknowl-
" edged it before a proper officer. The certificate of
" acknowledgment was in conformity with the statute,
" but the *body of the deed* did not describe Johnson's wife
" as a *grantor*, or name her in connection with dower,
" or in any other way. In *holding* that this was a *valid*
" *deed* and sufficient to relinquish the wife's right of
" dower under section 21, of the act of 1845, regulating
" conveyances, the court said *that apt words of grant in*

" *the body of the deed were unnecessary*, as the wife was " required to JOIN her husband in the deed, not to trans- " fer title from her, but merely to extinguish her con- " tingent right of dower.

" When Mrs. Lynn and her husband executed their " deed in 1856, the *latter* had the rights which the com- " mon law gave him in his wife's real estate in Illinois. " He was entitled to the rents and profits during their " *joint lives*, and a life estate thereafter if he survived " his wife. While his rights differed in some material " respects from the inchoate right of dower, *still the* " *reasoning in this case tends to support the deed under con-* " *sideration.*

" In *Miller* v. *Shaw*, 103 Ill., 277, the court was required " to pass upon the validity of a married woman's deed " for her separate property in Illinois, the husband hav- " ing *signed and acknowledged the deed*, his name *not ap-* " *pearing*, however, in the *granting clause.* The statute " in force at that time (Sec. 21 of the Act of 1845) pro- " vided that when any husband and wife residing in this " state wished to convey the real estate of the wife it " should be lawful for the husband and wife, she being " above the age of eighteen years, to do so by the " EXECUTION of their JOINT deed, the wife being required " to appear before some judge or other officer author- " ized to take acknowledgments of such instruments " and acknowledge the same, being previously made " acquainted with the contents. A deed thus *executed* " and *acknowledged* the statute declared to be as effect- " ive *as if executed by the wife before marriage.* The " court held that this was *a valid deed under the statute*, " and bound both the wife and husband.

" In *Yocum* v. *Lovell*, recently decided by the Supreme

" court of Illinois, but not yet reported, it was held " that a deed *signed and acknowledged* by husband and " wife was sufficient to extinguish the homestead right " of both, though the wife's name did not appear in the " *granting clause* or *elsewhere* in the *body* of the deed. " The court say that in section 4, chapter 52, Rev. Stat. " of 1874, declared that no release, waiver or convey- " ance of the homestead should be valid unless the " same was in writing, subscribed by the householder " and his wife, and acknowledged as required in the " execution of deeds conveying real estate, and that the " statute was substantially complied with.

" Judgments will be entered for the defendants in " the three cases."*

The record of this suit has been brought to this court by *the plaintiff in error*, for review, upon a *writ of error* to the court below.

* See Transcript of Record, pages 5, 6, 7 and 8.

ARGUMENT.

The ruling of the court below, in *sustaining* the *validity* of the deed from Christina Lynn and her husband, is the only question presented for the consideration of the court.

The deed in controversy states that Christina was a sister and heir at law of Henry Millspaugh, deceased, who served in the war of 1812; also refers to a land warrant, etc., etc.: This, taken in connection with *the extreme brevity of the record* before the court, is deemed a *sufficient excuse* for commencing this argument with a short statement of *incontrovertible* facts, as follows:

That Henry Millspaugh served in the war of 1812, and became entitled to a land warrant for 160 acres of the public lands. He died, without having obtained such warrant, leaving surviving him his brother, David Millspaugh, and his sister, Christina Lynn, his only heirs at law.

That in June, 1847, David and Christina *jointly* obtained such warrant.

That in August, 1849, David and Christina *located* such warrant upon the quarter section described in the declaration herein.

That in November, 1849, a patent was *issued* to David and Christina for such quarter section.

That in May, 1856, while residing in Michigan, Christina, *by deed duly* EXECUTED *and* ACKNOWLEDGED *by herself and her husband,* CONVEYED *all her right, title, claim and interest in and to such quarter section,* to Milton and Thomas C. McEwen, which deed was thereupon placed

on record, in the office of the Recorder of Deeds, in Cook County, in Illinois, AND IS THE DEED IN CONTROVERSY HEREIN.

That at the same time, the heirs of David, *by deeds duly* EXECUTED *and acknowledged,* CONVEYED *all their rights, titles, claims and interests in and to such quarter section,* to Milton and Thomas C. McEwen, which deeds were thereupon placed on record in the office of the recorder of deeds, in Cook County, in Illinois.

That thereafter the McEwens, as *owners* thereof, *paid all taxes* levied upon such quarter section, *entering upon and taking possession of the same.*

That Christina and her husband subsequently departed this life.

That in March, 1880, TWENTY-FOUR YEARS *after purchasing such quarter section,* and after it had *greatly increased in value,* the McEwens conveyed the same, *for a large consideration,* to others, who subsequently conveyed part thereof, for a *like large consideration,* to PULLMAN'S PALACE CAR COMPANY, *the defendant in error.*

That *the defendant in error, as the owner thereof,* ENTERED UPON AND TOOK QUIET AND PEACEABLE POSSESSION OF SUCH PART OF SUCH QUARTER SECTION, ERECTING THEREON, IN PART, THE TOWN OF PULLMAN, AND ESPECIALLY THE EXTENSIVE CAR WORKS, AT THE TOWN OF PULLMAN, THUS MAKING PERMANENT IMPROVEMENTS, IN VALUE, AMOUNTING TO MORE THAN $1,000,000.

That in March, 1885, *a little more than one year and a half ago,* and about TWENTY-NINE YEARS *after the execution, delivery, and recording in the office of the recorder of deeds, in Cook County, in Illinois, of the deed in controversy,* the record of *such deed* being a conveyance by the *wife,* of *her separate property,* her husband JOINING

in the EXECUTION and ACKNOWLEDGMENT of the same, but *not* being mentioned in the *granting clause* or *body* thereof, was *accidentally discovered, not* by a *bona fide* interested person—an heir-at-law or personal representative of Christina, *there being no such person;* it was thereupon *concluded* that such deed was *invalid:* St. Clair County, Michigan, the place referred to in such deed, as the residence of Christina and her husband, was visited; Mary Ann Cunningham who claimed to be the heir of Christina, was found; there was *paid to her* ONE DOLLAR *only*, for a *quit claim* deed, for *any interest* she might have in such quarter section, which deed was procured to be executed to BRADLEY G. SCHLEY, *the plaintiff in error;* such deed is as follows:

"THIS INSTRUMENT WITNESSETH: That the grantors, Mary Ann "Cunningham, daughter and devisee of Christina Lynn, and Richard "Cunningham, her husband, both of the County of St. Clair, State "of Michigan, in *consideration* of ONE DOLLAR, and for other valuable "considerations, do hereby convey and grant, bargain and sell unto "BRADLEY G. SCHLEY [the plaintiff in error] all right, title and in-"terest in and to the south-east quarter of section fifteen, township "thirty-seven, North, range fourteen East, of the third principal "meridian, in Cook County, Illinois, expressly releasing all rights of "dower and homestead.

"Dated this thirty-first day of March, in the year eighteen hundred "and eighty-five. "MARY ANN CUNNINGHAM, [L. S.]

"RICHARD CUNNINGHAM. [L. S.]"

(Which deed was acknowledged.)

No time was lost in advising PULLMAN'S PALACE CAR COMPANY, *the defendant in error*, of the making of such *discovery*, and of the obtaining of such *quit claim* deed, and in *demanding settlement* under a *threat* of suit, to recover the undivided half interest, referred to, in such

part, of such quarter section, which *demand and threat*, received the appropriate rebuke; hence this suit.

The *investment* of such ONE DOLLAR, in the obtaining of such QUIT CLAIM DEED, from Mary Ann Cunningham, FORMS THE BASIS FOR, AND CONSTITUTES THE MERITS OF, this suit, by *the Plaintiff in Error.*

The *Plaintiff in Error* resides in Milwaukee, and it is at least but charitable to *assume*, is engaged in a more reputable business than the prosecution of the suit by him might indicate. He is either an *interested* party, or is *wrongfully suffering his name to be used*, for the purpose of securing a *Federal Court jurisdiction*, on account of citizenship. He must be *presumed* to have *knowledge* that the suit is based upon a PRETENDED, FICTITIOUS, FALSE, OLD, STALE CLAIM, WITHOUT THE SHADOW OF MERIT, AND WITHOUT A *bona fide* PARTY AS A BENEFICIARY, in the results sought to be obtained, consequently, he is *not* free from *censure* for being a *party* to what is so apparently a *champertous suit, prosecuted for purely speculative purposes.*

The counsel for *the Plaintiff in Error* have knowledge of the facts stated, and are *not*, therefore, without fault in commencing and prosecuting the suit. They well know that the suit is *founded* upon a *pretentious fabrication*, and consequently, upon an *unreal* and *unjust* claim.

Counsel for *the Plaintiff in Error* have, in their printed argument herein, assumed an *eccentric* as well as an *equivocal* position. They say:*

"The deed does not even disclose the fact that Christina "was a married woman, or that she acts therein as a mar- "ried woman, or intends to effect her rights as such."

* See last paragraph on page 6.

And again they say: *

" *The certificate of acknowledgment cannot be referred to,* " *to supply any omissions in the deed itself.*"

The position thus assumed is *eccentric,* because the deed in controversy, together with the *certificate of acknowledgment* attached thereto, furnish the *only record evidence* before the Court, that Christina *was a married woman* at the time of *executing the deed in controversy.*

The position thus assumed is *equivocal,* because it is a statement to the effect that Christina *was not a married woman* at the time of *executing the deed in controversy,* when at the *same time* it is *insisted* that such deed is *invalid,* because *at the time of executing the same,* by Christina, *she was a married woman,* and that her husband *was not* mentioned in the *granting clause* or *body* of such deed.

It is certainly unnecessary for *the Defendant in Error* to *controvert* the claim thus made, to the effect that there is *no record evidence before the Court,* that Christina *was a married woman* at the time of *executing the deed in controversy.* If the Court be satisfied that Christina was a *feme sole* at the time of *executing the deed in controversy,* then the judgment of the Court below will be *affirmed* without further consideration.

It is claimed that the *deed in controversy* is *invalid* for the reason that the *husband* who JOINED in the EXECUTION and ACKNOWLEDGMENT of the same, is *not* mentioned in the *granting clause or body thereof.*

Christina's husband JOINED her in the EXECUTION and ACKNOWLEDGMENT of *the deed in controversy.* It was *not* necessary that he should have been mentioned in the

* See middle paragraph on page 7.

granting clause or *body* of such *deed. Such deed* is, therefore, *valid.*

STEWART, in his late work on Husband and Wife,* says:

"The husband's JOINDER in his wife's deed is gen-
"erally necessary to render it valid, and is unnecessary
"only when she is expressly authorized to deed as if
"sole, or as if unmarried. At common law he has an
"actual estate to convey, and it would seem that *he had*
"*to join as a co-grantor;* but when the WHOLE ESTATE IS
"VESTED IN HIS WIFE, and his *assent* is required to *pre-*
"*vent imposition*, HIS MERE SIGNATURE TO THE DEED IS
"ENOUGH, and HE NEED NOT BE NAMED IN THE BODY OF THE
"DEED."

The laws of Illinois, in force on May 29, 1856, the date of the EXECUTION of the deed in controversy, only required the husband to JOIN in the EXECUTION and ACKNOWLEDGMENT of a deed by the wife, conveying her separate estate.

SECTIONS 1, and 2, of an act entitled: "*An Act to*
"*amend the 24th chapter of the Revised Laws, entitled*
"'*Conveyances,*'" approved February 22, 1847,† are as follows:

"SECTION 1. *Be it enacted, &c.*, That all deeds and conveyances
"of land lying within this State, shall be *acknowledged* or *proved*
"before either of the following named officers, to wit: Any judge
"or justice of the Supreme or District court of the United States, any
"commissioner to take acknowledgment of deeds, any judge or justice
"of the Supreme, Superior or Circuit court of any of the United
"States, or their territories; any clerk of a court of record, mayor of
"a city, or notary public; but when such *proof* or *acknowledgment* is

* See Husband and Wife, Stewart, section 369.

† See Real Estate Statutes and Decisions of Illinois, by Adams & Durham, Vol. I, page 174.

"made before a clerk, mayor or notary public, it shall be certified by "such officer under his seal of office. Such *proofs* and *acknowledg-* "*ments* may also be made before any justice of the peace; but if such "justice of the peace reside out of the state, there shall be added to "the deed a certificate of the proper clerk, setting forth that the per- "son before whom such *proof* or *acknowledgment* was made, was a "justice of the peace at the time of making the same. If such justice "of the peace reside within this state, the certificate of the clerk of "the County Commissioners' court of the proper county, under his "seal of office, that the person taking such *proof* or *acknowledgment* "was a justice of the peace at the time of taking the same, shall be "deemed sufficient evidence of that fact; if such justice reside within "the county where the lands conveyed are situate, no such certificate "shall be required. All deeds and conveyances which have been or "may be acknowledged or proved in the manner prescribed in this "section, shall be entitled to record, and (shall) be deemed as good "and valid in law in every respect, as if the same had been *acknowl-* "*edged* or *proved* in the same manner prescribed in the sixteenth sec- "tion of the twenty-fourth chapter of the revised laws, to which this "act is an amendment. (See Sec. 1, act Jan. 22, 1829, *ante.*)

"SECTION 2. When any *feme covert not residing in this state being* "*above the age of eighteen years*, shall JOIN with her husband in the "EXECUTION of any deed, mortgage, conveyance, or other writing of, "or relating to, any lands or real estate, situate within this state, she "should thereby be barred of and from all estate, right, title, interest "and claims of dower therein, in like manner as if she was *sole*, and "of *full age*. And any such *feme covert*, JOINING with her husband in "the EXECUTION of a power of attorney, or other writing authorizing "the sale, conveyance or other disposition of lands or real estate, as "aforesaid shall be bound and concluded by the same, in respect to the "right, title, claim or interest in such estate, as if she were *sole* and "of *full age*, as aforesaid; and the *acknowledgment* or *proof* of such "deed, mortgage, conveyance, power of attorney, or other writing, "may be the same as if she were *sole*, and shall entitle such deed, "mortgage, conveyance or power of attorney, or other writing to be "recorded as is authorized by this act; and the provisions of this "section shall apply to deeds, mortgages, powers of attorney and

"other writings heretofore, as well as those which may hereafter be "executed. (See Sec. 14, Act Jan. 31, 1827, and Sec. 2, Act Feb. "22, 1847, *post.*)"

Also, section 1 of an act entitled "*An Act to amend "the 24th chapter of the Revised Statutes, entitled 'Con-"veyances,' approved Feb. 11, 1853,*" * is as follows:

"SECTION 1. That no deed, mortgage, or other instrument of "writing, heretofore EXECUTED, or hereafter to be EXECUTED, by hus-"band and wife, in good faith, for the purpose of conveying or incum-"bering the estate of the husband, or the estate of the wife, or the "right of dower in any lands situate in this state, and ACKNOWLEDGED "by them before any officer authorized by the laws of this state to "take *acknowledgments*, shall be deemed, held, or adjudged invalid, "or defective or insufficient in law, by reason of any informality or "omission in setting forth the particulars of the *acknowledgment* "before such officer as aforesaid, in the certificate thereof: *Provided*, "*however*, that it appears in substance, from such certificate, that the "parties EXECUTING said deed, mortgage or other instrument of writ-"ing, executed the same freely and voluntarily; and that in case of "married women *executing* the same, it appear, in substance, that they "knew the contents of said deeds, mortgages or other instruments of "writing, and that they were examined by the officer aforesaid, sepa-"rate and apart from their husbands."

The laws thus quoted, or re-enactments thereof, have been construed by the Supreme Court of Illinois, on *three separate occasions.* Once in 1869, once in 1882 and once in 1884. On the *first* occasion it was *distinctly and unequivocally held, that where the name of the wife did not appear in the* GRANTING CLAUSE *or* BODY *of a conveyance, by the husband,* which was *signed and acknowledged by the wife,* such conveyance *was valid as to both husband and wife.* On the *second* occasion, it was *distinctly and*

* See Real Estate Statutes and Decisions of Illinois, by Adams & Durham, Vol. I, page 185.

unequivocally held, that where the name of the HUSBAND *did not appear in the* GRANTING CLAUSE *or* BODY *of a conveyance*, by the WIFE, *of her separate property*, which was SIGNED and ACKNOWLEDGED by the HUSBAND, *such conveyance was valid as to both* the WIFE and the HUSBAND. On the *third* occasion, it was again *distinctly and unequivocally held, that where the name of the* HUSBAND or the name of the WIFE *did not appear in the* GRANTING CLAUSE or BODY *of a conveyance, by the other*, which was SIGNED and ACKNOWLEDGED *by both*, such conveyance *was valid as to both husband and wife.*

On the occasions referred to, *it was also held*, that a *mere* EXECUTING or SIGNING by the *husband* or by the *wife*, of a conveyance by the other, of his or her property, was a JOINING with the other in such conveyance, and that the words "EXECUTING," "SIGNING" and "JOINING" were, in effect, *synonymous terms.*

The three decisions by the Supreme Court of Illinois, referred to, will be here quoted in part, as follows:

In the suit in favor of *Eliza Johnson* and against *Joseph Montgomery et al.*,* it was held that where a married woman *signs and acknowledges* her husband's deed, she "JOINS" in it, although her name be *not mentioned* in the *granting clause* or *body* of the deed, and that such deed *is valid* as to *both* husband and wife.

Justice LAWRENCE, in delivering the opinion of the court in September, 1869, says:

"In *Blaine* v. *Harrison*, 11 Ill., 385, this court said: "'*The right of dower in a married woman is a mere in-*"*tangible, inchoate, contingent expectancy, and even in a* "*widow*, until it is assigned, it is no estate in the land, "but is a right resting in action only, and can not be

* See 31st Ill., page 185.

"aliened. The widow may release her dower so as to "bar herself the right of asserting it against the owner "in fee, but she cannot invest any one with it.'

"We will only add in conclusion, that this question—"the *mode* in which a deed must be EXECUTED in order "to bar dower—is purely a matter of LOCAL LAW REST-"ING ON THE CONSTRUCTION OF OUR OWN STATUTES, and "the DECISIONS OF COURTS IN OTHER STATES CAN HAVE "LITTLE WEIGHT IN COMPARISON WITH THE CONSTRUCTION "WHICH HAS BEEN UNIFORMLY GIVEN TO OUR LAWS BY THE "PROFESSION, EVEN THOUGH SUCH CONSTRUCTION HAS "NEVER RECEIVED DIRECT RECOGNITION FROM THIS COURT. "This precise question has not hitherto been presented, "but we entertain *no doubt it has always been supposed by "both the people and the profession in this state, that a "married woman signing her husband's deed, and being "properly examined before an officer, and causing his cer-"tificate of that fact to be placed upon the deed, would "bar her dower in the premises conveyed, although her name "nowhere appeared in the body of the deed.* By SIGNING "*the deed she* 'JOINS' *in it, and having done this, her dower "is barred, if she takes the other steps pointed out by the "statute.* These steps are most important for her pro-"tection, and have always been guarded by this court. "But to *hold that signing the deed is not* JOINING *in it for "the purposes of this statute,* would be to *disregard its "spirit and purpose* and overturn a long settled construc-"tion, for the purpose of enabling widows to claim "what they had once in good faith solemnly professed "to relinquish. *Decree affirmed.*"

In the suit in favor of *John B. Miller et al,* and against *Theodore A. Shaw et al.,** it was held that where a hus-

* See 103 Ill, page 277.

band *signs and acknowledges* the wife's deed to her separate estate, he "JOINS" with his wife in the EXECUTION of such deed although his name be not mentioned in the *granting clause* or *body* of the deed, and that such deed is *valid* both as to husband and wife.

Chief Justice SCOTT, in delivering the opinion of the court in June, 1882, says:

"Mrs. Sheldon, at the time of the making of the "deed of February 8, 1867, to Ward, under which de- "fendants derive title, was a married woman, living with "her husband, Seth Sheldon, Jr., and the *defect* said to "exist in the deed is that her husband did not 'JOIN' with "her in the *granting clause* of the deed so as to pass the "title to her separate property, as this was. The *stat- "ute then in force*, in relation to conveyances of real "estate by a married woman, provided when any *hus- "band and wife* residing in this State shall wish to *con- "vey* the real estate of the *wife*, it shall and may be "lawful for the *husband* and the *wife*, she being above "the age of eighteen years, to EXECUTE any grant, bar- "gain, sale, lease, release, feoffment, deed, conveyance "or assurance in law whatsoever for the conveying of "such lands, tenements and hereditaments; and if, after "the executing thereof, such wife shall appear before "some judge, or other officer authorized to take ac- "knowledgments of such instruments, and ACKNOWLEDGE "the same, after having been made acquainted with its "contents by such officer, and such deed being acknowl- "edged or proved according to law as to the husband, "shall be as *effectual in law* as if EXECUTED by such "*woman while sole and unmarried*. That which this stat- "ute requires to be done to enable the wife to convey her "*separate property* is, that she and her husband shall EXE-

" CUTE *the deed,* and after that she shall appear before a " proper officer and acknowledge the same in the mode " pointed out in the statute, and such deed being AC- " KNOWLEDGED or proved according to law by the hus- " band, *it will be as effectual to pass the title to the wife's* " *separate property as the deed of an unmarried woman* " *would be to convey her property. All this was done in* " *this case.* Both Mrs. Sheldon and her husband, Seth " Sheldon, EXECUTED the deed to Ward, and afterward " she appeared before a proper officer and ACKNOWL- " EDGED it in conformity with the statute, and the *ac-* " *knowledgment* of her husband to the deed being accord- " ing to law, that seems to be all the law requires to be " done to make the *deed effectual* to pass the title to the " wife's separate estate."

In the suit in favor of *Francis M. Yocum* and against *Andrew J. Lovell** it was held that it was not necessary that the name of the *husband* or *wife* of the *grantor* of land, should appear in the *granting clause* or *elsewhere* in the *body* of the deed, provided such deed be *signed and* ACKNOWLEDGED by *both husband and wife*; also *Miller* v. *Shaw* approved.

Justice SCOTT, in delivering the opinion of the court, in September, 1884, says:

" On the trial, defendant objected to the reading of " both trust deeds in evidence, on the ground that " neither of them was so EXECUTED as in law to bar or " cut off the homestead of defendant, or that of his " wife, residing with him on the premises. * * * " *The objection taken to the trust deed to Thomas, under* " *which the property was sold to plaintiff, is, that although* " *the signatures of both the husband and wife appear*

* See 111 Ill., page 212.

" SIGNED *to the deed, yet it is solely the deed of the husband.*
" THE NAME OF THE WIFE OF THE GRANTOR NOWHERE AP-
" PEARS IN THE GRANTING CLAUSE, OR ELSEWHERE IN THE
" BODY OF THE DEED. *In the body of the deed all exemp-*
" *tion of homestead is expressly relinquished, and the deed*
" *is subscribed by the wife of the grantor, and is* ACKNOWL-
" EDGED *by her in conformity with the statute.* That, it is
" thought, is all the statute requires to be done. *Section*
" *4, chapter 52, of the Revised Statutes of 1874, declares no*
" *release, waiver or conveyance of the estate of homestead so*
" *exempted shall be valid unless the same is in writing,* SUB-
" SCRIBED *by the householder and his wife, or her husband,*
" if he or she have one, and ACKNOWLEDGED in the same
" manner as conveyances of real estate are required to
" be ACKNOWLEDGED. It will be observed all the statute
" requires to make the release, or waiver, or convey-
" ance of the homestead, valid, is that such relinquish-
" ments shall be in writing, and SUBSCRIBED by the hus-
" band or wife of the grantor, if he or she have one, and
" that it shall be ACKNOWLEDGED as conveyances are re-
" quired to be ACKNOWLEDGED by the 27th section of the
" Conveyance act. That was done in this case. The
" wife of the grantor SUBSCRIBED the deed relinquishing
" all exemption of homestead, and ACKNOWLEDGED the
" same as the law provides shall be done. *The statute*
" *has not required that the name of the husband or wife of*
" *the grantor shall appear in the granting clause, or else-*
" *where in the body of the deed.* Unless made so by
" statute, *it is not imperative it shall so appear.* It is suf-
" ficient for a valid relinquishment of homestead that it
" is done in conformity with the statute.

" A question having some analogy to the case now be-
" fore the court, was passed upon by this court in *Miller*

" v. *Shaw*, 103 Ill., 277. THE DEED WAS THAT OF A MAR-
" RIED WOMAN, AND IT WAS INSISTED IT WAS NOT SUFFICIENT
" TO CONVEY HER SEPARATE PROPERTY, BECAUSE HER HUS-
" BAND DID NOT JOIN WITH HER IN THE GRANTING CLAUSE
" OF THE DEED, AND IT WAS HELD UNDER THE STATUTE
" THEN IN FORCE THAT WHICH IT REQUIRED TO BE DONE TO
" ENABLE THE WIFE TO CONVEY HER SEPARATE PROPERTY IS
" THAT SHE AND HER HUSBAND SHALL EXECUTE THE DEED
" and after that she shall appear before a proper officer
" and ACKNOWLEDGE the same in the mode pointed out by
" the statute, and such deed being ACKNOWLEDGED or
" proved according to law by the husband, it would be
" effectual to pass the title to the separate property of
" the wife. *In the case now being considered the wife* JOINS
" *with her husband in the release of the homestead in pre-*
" *cisely the same manner as the husband did with the wife*
" *in the case cited, and that conforms to the provision of*
" *the 27th section of the Conveyance act of the Revised*
" *Statutes of 1874.*"

The counsel for the Plaintiff in Error, in their printed argument herein, refer to the laws of Illinois, in force at the time of the *execution of the deed in controversy*, relating to FOREIGN ACKNOWLEDGMENTS, being section 3, of an act entitled, "*An Act to amend the 24th chapter of the* " *Revised Laws, entitled* '*Conveyances*,'" approved February 22, 1847. They also quote from the laws of Michigan, in force at the time of the *execution of the deed in controversy*, relating to ACKNOWLEDGMENTS.*

Section 3, of the laws of Illinois, thus referred to, is as follows:†

"SECTION 3. That deeds, mortgages, conveyances,

* See page 38.

† See Real Estate Statutes of Illinois, Adams & Durham, Vol 1, page 175.

" powers of attorney, or other writings of, or concern-
" ing lands, or real estate, *situated within this state and*
" *which have been, or may hereafter be,* EXECUTED WITHOUT
" THIS STATE, and within the United States, *and which*
" *have been, or may hereafter be,* ACKNOWLEDGED OR PROVED
" in CONFORMITY WITH THE LAWS OF THE STATE, TERRI-
" TORY OR DISTRICT, IN WHICH THEY WERE EXECUTED, *shall*
" *be admitted to record in the county or counties wherein the*
" *land or real estate affected are situated;* and such deeds,
" mortgages, conveyances, powers of attorney, or other
" writings, *acknowledged* or *proved* as aforesaid, *when so*
" *recorded,* may be used as evidence, WITHOUT FURTHER
" PROOF OF THE EXECUTION THEREOF."

The section of the Statute thus quoted, was construed by the Supreme Court of Illinois, in 1856, when it was *distinctly and unequivocally held,* that deeds for lands in Illinois, EXECUTED *in any other state or territory or in the District of Columbia,* which were EXECUTED and ACKNOWLEDGED *according to the laws of the* PLACE where they were EXECUTED, might be *read in evidence, without further proof;* THAT TO PROVE THAT SUCH DEEDS EXECUTED IN OTHER STATES OR TERRITORIES WERE EXECUTED IN CONFORMITY WITH SUCH LOCAL LAWS, THE STATUTES OF THE STATES OR TERRITORIES WHERE THE DEEDS WERE EXECUTED MIGHT BE READ.

Justice SKINNER, in delivering the opinion of the court, in December, 1856, says:*

" Deeds for lands *lying in this state,* EXECUTED in
" ANOTHER STATE OR TERRITORY of the Union, or in the
" District of Columbia, which are EXECUTED and AC-
" KNOWLEDGED OR PROVED, *according to the laws of the*
" PLACE *where made,* may, *by our laws,* be read in evi-

* See *Hurt* v. *McCartney*, 18 Ill., 129.

"dence, *without further proof of execution.*" (Reference is here made to the section of the statute quoted.)

"The ordinary way of *proving conformity* with the law "of the *place of execution* is *by the production of the stat-* "*utes of the state or territory authorizing the mode of exe-* "*cution adopted.*" (Reference is here made to *Secrist* v. *Green*, 3 Wall., U. S. R., 749.)

"In such case it will appear *from the inspection of the* "*deed and acknowledgment, or proof,* in connection with "the law of the place where made, *whether the mode* "*adopted is in conformity with the law of such place.*"

The section of the Statute thus quoted, was, also, construed by the Supreme Court of the United States, in 1865, when it was held that a deed *executed* and *acknowledged* in New York, according to the laws thereof, conveying a large tract of land in Illinois, *was entitled to be recorded in Illinois,* in the county where the property was situated, *and when so recorded, was properly read in evidence.* Justice DAVIS, in delivering the opinion of the court, in December, 1865, says:*

"The authentication by the master in chancery in "New York of the deed to William James, when made, "was in conformity to the laws of New York for the "conveyance of real estate within the State. By the "terms of an act concerning the proof of deeds and "conveyances, passed by the legislature of New York "on the 6th of April, 1801, and substantially re-enacted "on the 12th of April, 1813, a master in chancery was "authorized to take the proof and acknowledgment of "deeds. This authority remained unchanged until July "1, 1818. After that, he was forbidden to do any "official act which did not exclusively pertain to his

* See *Secrist* v. *Green*, 3rd Wallace, 749.

" duties as a master in the Court of Chancery. If the " grantor was not known to the officer taking the " acknowledgment, the law required that the deed " should be proved by satisfactory evidence, and that " the substance of the evidence, with the names of the " witnesses, should be incorporated in the certificate of " acknowledgment. *All this was done in the case of this* " *deed;* AND IF THE LANDS HAD BEEN IN NEW YORK IT IS " CERTAIN THAT THE DEED COULD HAVE BEEN READ IN EVI- " DENCE IN ANY OF THE COURTS OF THAT STATE WITHOUT " FURTHER PROOF. What *effect* is to be given to such an " instrument, *thus authenticated, in Illinois*, must of " course *depend* wholly upon the *statutes* of that *state;* " and on this point we are *not left in doubt*. Provision is " made in an act of the *legislature of Illinois* for the " *record* of all deeds to lands *in that state* which have " been EXECUTED *without the State* and within the United " States, and have been ACKNOWLEDGED OR PROVED in " *conformity* to the laws of the *State* WHERE EXECUTED. " The act also declares that *all such deeds, when so re-* " *corded*, may be used as evidence *without further proof* " *of their execution*. The deed under review, *having been* " *acknowledged and proved, as required by the laws of New* " *York*, when it was EXECUTED, *was entitled to be recorded* " *in Illinois, and was properly read in evidence*. It was, " indeed, insisted that there should have been some " proof of the official character of the master in chan- " cery. But neither the legislatures of *New York* or " *Illinois* saw fit to require any such proof, and therefore " *none* was necessary."

The laws of Michigan, known as the "*Married Woman's Act, of February 13th, 1855*,"* and which was in force at

* See Howell's Annotated Statutes of Michigan, 1882, Vol. 2, Section 6295, page 1635.

the time of *the execution, by Christina, of the deed in controversy*, did *not* require that the *husband* should JOIN in the EXECUTION of a deed, by the WIFE conveying her *separate property*. Section 1, of such act, is as follows:

"SECTION 1. *The People of the State of Michigan en-*
"*act*, THAT THE REAL AND PERSONAL ESTATE OF EVERY FE-
"MALE, ACQUIRED BEFORE MARRIAGE, AND ALL PROPERTY,
"REAL AND PERSONAL, TO WHICH SHE MAY AFTERWARD
"BECOME ENTITLED, BY GIFT, GRANT, INHERITANCE, DEVISE,
"OR IN ANY OTHER MANNER, SHALL BE AND REMAIN THE
"ESTATE AND PROPERTY OF SUCH FEMALE, and shall not be
"liable for the debts, obligations and engagements of her
"husband, *and may be contracted, sold, transferred, mort-*
"*gaged, conveyed, devised or bequeathed by her, in the same*
"*manner and with like effect* AS IF SHE WERE UNMARRIED."

The statute thus quoted, has been construed by the Supreme Court of Michigan, on a number of occasions, among which reference will be made to the following:

In the suit in favor of *Watson* and against *Thurber*,* it was held, that after the passage of the "*Married "Woman's Act, of February 13, 1855*," A WIFE, WHEN CONVEYING HER OWN LANDS, was *not* required to *acknowledge* separate and apart from her husband.

In the suit in favor of *Fisher* and against *Provin*,† it was held, that by the "*Married Woman's Act of Feb-*
"*ruary 13, 1855*," the WIFE MIGHT TAKE, HOLD AND DISPOSE OF HER SEPARATE PROPERTY, THE SAME AS IF SHE WERE UNMARRIED, AND IN SO FAR AS RELATES TO THEIR PROPERTY RIGHTS AND INTERESTS, A HUSBAND AND WIFE ARE NO LONGER CONSTITUTED A SINGLE PERSON IN LAW.

In the suit in favor of *Frickee* and against *Donner*,‡

* See 11 Michigan, 457 and 470.

† See 25 Michigan, 350.

‡ See 35 Michigan, 151.

it was held, that where, since the "*Married Woman's "Act of February 13, 1855*," a HUSBAND "JOINS" with his WIFE in a *conveyance* or *mortgage* of *her* lands, *defects* in the EXECUTION or ACKNOWLEDGMENT on *his* part, will *not* affect the instrument if *validly* EXECUTED and ACKNOWLEDGED by *her*.

At the time of the execution of the deed in controversy, Christina and her husband resided in Michigan.

The laws of Michigan then in force *did not require* the HUSBAND to JOIN in a CONVEYANCE by the WIFE, of her *separate property*.

As to whether or not, at the time of the execution of the deed in controversy, it was necessary that Christina's husband, who JOINED in the EXECUTION and ACKNOWLEDGMENT of the same, should have been *mentioned* in the GRANTING CLAUSE or BODY thereof, is a question governed wholly by *local laws*, either by the laws of Illinois, or by the laws of Michigan, or by both, in force at the time; *if by the laws of Illinois the Supreme Court there*, HOLDS THAT IT WAS NOT NECESSARY; *if by the laws of Michigan, the Supreme Court there*, HOLDS THAT IT WAS NOT NECESSARY; thus the matter is disposed of in *favor* of the *validity* of the deed in controversy.

WHEREFORE, the Defendant in Error, prays that the finding and judgment of the court below be in all things affirmed, together with other and further appropriate relief.

ALFRED ENNIS,
General Counsel Pullman's Palace Car Company.

CHICAGO, Illinois, December 31, 1886.

120-575

FILED
JAN 17 1887

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1886.

BRADLEY G. SCHLEY,
Plaintiff in Error,
vs.
PULLMAN'S PALACE CAR COMPANY,
Defendant in Error.

Error to
United States
Circuit Court,
Northern District
of Illinois.

MOTION.

S. CORNING JUDD,
ALBERT RITCHIE,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

BRADLEY G. SCHLEY, *Plaintiff in Error,* *vs.* PULLMAN'S PALACE CAR COMPANY, *Defendant in Error.*	Error to United States Circuit Court, Northern District of Illinois.

MOTION.

By express agreement of counsel (made a part of this record) nothing was submitted to the court, but the single question of the validity *vel non* of the deed from Christina and William Lynn.

The record sufficiently discloses (as does the opinion of the lower court) that certain facts were brought to the notice of the court below, but that subsequently the case was contracted to this one point.

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Appellant is now astonished to find from appellee's brief (withheld from the record to so late a date that appellant's counsel did not receive a copy until January 8, 1887, some days after the case had been taken by this court) that this specific agreement has been violated, and that appellee's counsel has abused his privileges as an attorney of this honorable court by introducing into his brief (on pages 11, 12, 13 and 14) a large amount of matter entirely outside the record, and further by unwarranted personal allusions to appellant and his counsel. His apology to this court is "the brevity of the record." The record shows that it was the deliberate purpose and agreement of both parties to make it exactly what it is.

His apology to appellant (sent through a messenger to one of the junior counsel) is that "there was no intention "to give offense," and the expression of a "hope that no "offense would be taken."

The appellant respectfully shows that the statements and imputations on the above mentioned pages of appellee's brief in respect to the circumstances under which the appellant's title accrued, the consideration therefor, the heirship of his grantor, Mary Ann Cunningham, her interest in this suit, the negotiations with appellee preceding suit, etc., etc., are not true, and that statements in other respects in said portion of appellee's brief are not full, but are garbled.

Appellant is advised that it would not be just to himself to allow this attempt as to facts, or alleged facts, to reach the mind of this court otherwise than through the record to pass unnoticed. Wherefore he moves the court that pages 11, and 12, and 13, and page 14, down

to the sixth line from the bottom, be stricken from appellee's brief; or, if not so ordered, that he may have leave to set forth on the record, or by way of reply brief, the true facts in reference to the extraneous matters in appellee's brief contained.

Respectfully submitted.

S. Corning Judd,
Albert Ritchie,
Counsel for Plaintiff in Error.

